No. 87-548-CFX
Status: GRANTED

Title: Trans World Airlines, Inc., Petitioner
v.
Independent Federation of Flight Attendants

Docketed:
October 1, 1987

Court: United States Court of Appeals
for the Eighth Circuit

See also:
86-1650

Counsel for petitioner: Gartner,Murray

Counsel for respondent: Hurley,John P.

NOTE* Caption shld be as above

Entry	Date	Note	Proceedings and Orders
1	Oct 1 1987	G	Petition for writ of certiorari filed.
2	Nov 2 1987		Brief of respondent Independ. Fed. of Flight Att. in opposition filed.
3	Nov 4 1987		DISTRIBUTED. November 25, 1987
5	Nov 17 1987	X	Reply brief of petitioner TWA filed.
6	Feb 29 1988		REDISTRIBUTED. March 4, 1988
9	Mar 8 1988		REDISTRIBUTED. March 18, 1988
10	Mar 15 1988		Letter from respondent received and distributed.
11	Mar 21 1988		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Apr 7 1988		Order extending time to file brief of petitioner on the merits until May 26, 1988.
14	May 24 1988		Brief amicus curiae of United States filed.
15	May 26 1988		Joint appendix filed.
16	May 26 1988		Brief of petitioner TWA filed.
17	May 26 1988	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
18	May 26 1988	G	Motion of Airline Industrial Relations Conference for leave to file a brief as amicus curiae filed.
19	May 26 1988	G	Motion of Crossover Flight Attendants for leave to file a brief as amicus curiae filed.
20	May 31 1988		Record filed.
		*	Certified copy of original record and proceedings received.
26	Jun 1 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Jun 6 1988		Order extending time to file brief of respondent on the merits until July 15, 1988.
23	Jun 13 1988		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
24	Jun 13 1988		Motion of Airline Industrial Relations Conference for leave to file a brief as amicus curiae GRANTED.
25	Jun 13 1988		Motion of Crossover Flight Attendants for leave to file a brief as amicus curiae GRANTED.
27	Jun 20 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

No. 87-548-CFX

Entry	Date	Note	Proceedings and Orders
			argument GRANTED.
28	Jun 28 1988		Order further extending time to file brief of respondent on the merits until July 22, 1988.
29	Jul 19 1988		Order further extending time to file brief of respondent on the merits until July 25, 1988.
30	Jul 25 1988		Brief of respondent Independent Federation of Flight Attendants filed.
31	Aug 10 1988		CIRCULATED.
32	Aug 24 1988	X	Reply brief of petitioner TWA filed.
33	Aug 29 1988		Set for argument. Monday, November 7, 1988. (3rd case) (1 hr).
34	Nov 3 1988		Record filed.
		*	Certified copy of original record, 5 documents, received. (Box).
35	Nov 7 1988		ARGUED.

87 548

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permanently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

2. (a) Is a carrier required to displace permanent replacements, who have been hired and treated in all respects as employees and are engaged in required training under the carrier's supervision, and give their jobs to strikers at the end of an unsuccessful economic strike on the rationale that the replacements are not "employees" under the Railway Labor Act?

(b) Alternatively, are such employees not "permanent replacements" simply because they are still in training when the union calls off its unsuccessful strike?

PARTIES

The petitioner is Trans World Airlines, Inc. ("TWA"), a "common carrier by air" within the meaning of Title II (45 U.S.C. §§ 181 *et seq.*) of the Railway Labor Act. TWA has no parent company and no affiliates or subsidiaries, other than wholly-owned subsidiaries.

The respondent is The Independent Federation of Flight Attendants ("IFFA" or "the Union"), an unincorporated labor organization designated as the bargaining representative under the Railway Labor Act for TWA employees in the flight attendant craft or class.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No.

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner TWA respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 26, 1987 as holds (i) that some 1,300 flight attendants employed by TWA, who exercised their right not to strike, should have been forced to surrender their jobs to more "senior" strikers when the Union called off its unsuccessful strike, and (ii) that some 400 permanent replacements for strikers should have been required to forfeit their jobs to strikers because the replacements had not quite completed their training when the strike ended.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 819 F.2d 839, 125 L.R.R.M. 2544, is reprinted as Appendix A.[1] It affirms in part and reverses in part a judgment of the United States District Court for the Western District of Missouri, St. Joseph Division, based on a memorandum and order reported at 643 F. Supp. 470, 123 L.R.R.M. 2337, which is reprinted as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 26, 1987. On June 5, 1987, TWA timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The court below entered an order (reprinted as Appendix B) denying the petition on August 31, 1987. (Circuit Judges Bowman, Fagg and Gibson noted that they would have granted the petition; Circuit Judges Ross and Magill did not participate.) This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

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1 The pages of the appendices to this petition are referred to as "____ a."

On September 24, 1987, the Eighth Circuit entered an order (reprinted as Appendix C) staying the issuance of its mandate, to and including October 8, 1987, and pending certiorari proceedings.

STATUTES INVOLVED

The relevant statutory provisions are the Railway Labor Act ("RLA" or "the Act"), as amended, Sections 1, Fifth (45 U.S.C. § 151, Fifth); 2, Third (45 U.S.C. § 152, Third); 2, Fourth (45 U.S.C. § 152, Fourth); 2, Eleventh (45 U.S.C. § 152, Eleventh); 201 (45 U.S.C. § 181); and 202 (45 U.S.C. § 182); and the National Labor Relations Act ("NLRA"), as amended, Section 2(3) (29 U.S.C. § 152(3)). They are reprinted as Appendix F.

STATEMENT OF THE CASE

As foreshadowed by petitioner's reply brief on petition for certiorari which was granted in the earlier case between the same parties and is presently pending in this Court,[2] petitioner now requests the Court to review the second decision of the Eighth Circuit in the TWA-IFFA litigation. That strange decision, with flawed logic and a remarkable succession of misstatements of law and fact, purports to be based on the inapplicable[3] prior decision of the court below that the union security clauses of the 1981-84 TWA-IFFA contract continue in effect.

The decision below holds that employees who chose not to strike ("crossovers") should have been forced to give up their jobs at the end of the strike, in May 1986, to the unsuccessful strikers. In other words, the very employees who were required by the prior decision of the Eighth Circuit to pay dues to the respondent union from April, 1986 to now in order to keep

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2 *Trans World Airlines, Inc.* v. *The Independent Federation of Flight Attendants* ("the TWA Action"), No. 86-1650, *cert. granted*, June 8, 1987.

3 It is simply incomprehensible how or why the obligation of employees to pay dues to a union, against their will, should require those employees to give up their jobs to unreinstated strikers on the basis of a use of "seniority" that was not provided for even in the contract that contained the union security clauses, the continued existence of which is at issue in No. 86-1650.

their jobs[4] must surrender those jobs to strikers who have greater length of service. The court below so held even though the old agreement (as the district court found) did not provide for the use of seniority to return from a strike, and the Union failed to reach a new agreement with TWA about any terms or conditions of employment, much less about a way in which the permanently replaced strikers might come back to work.

At the same time, the court correctly acknowledged that some 2,400 permanent replacements could keep their jobs at strike's end. The anomalous result is that new hires with minimal length of employment who have been hired as permanent replacements for strikers are protected in their jobs, as this Court has held they must be, but permanent employees with considerably more time in the employ of the carrier—who elected not to support the strike, or to return to work at a time when vacancies existed—must surrender their jobs when the strike comes to an unsuccessful end, to the very strikers who were replaced by the new hires or who had become unnecessary because the work force had decreased. The Eighth Circuit nonetheless reversed the district court's clearly correct decision that crossovers were entitled to at least as much protection in their jobs as new hires.

In another untenable distortion of the law with respect to the reinstatement of strikers, the court below said that some 400 new flight attendants, hired as permanent replacements, must give up their jobs to unsuccessful strikers because those replacements had not quite completed their training when the union called off the strike. The Eighth Circuit affirmed the district court on this aspect of the case but disavowed its rationale. The district court had created an admittedly unprecedented "training school" exception to the permanent replacement rule of *Mackay Radio*, saying that new hires did not qualify as permanent replacements unless they completed their training within two days after the strike ended. The Eighth Circuit, however, said that the flight attendants in training

4 There is no question that those monies were used by IFFA to finance the litigation that has now resulted in the decision that the dues-payers must lose their jobs.

when the strike ended were not "employees" at all under the RLA because they did not perform any services for the carrier—despite its recital of their services as trainees under the direction of and in the pay of the carrier. Alternatively, the court below held that the trainees would not qualify as "permanent replacements" under the rationale of NLRA decisions.

Summary of Facts

TWA and IFFA were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. Following written notice under Section 6 of the RLA (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA, including direct negotiation, mediation and the final 30-day cooling-off period. On March 7, 1986, approximately two years after negotiations began, IFFA called a strike against TWA. For purposes of this action, it has been assumed that the strike was over only economic issues.[5]

In order to avoid interruption to its services, TWA operated with those flight attendants who wished to continue or resume working and hired permanent replacements for the striking flight attendants to complete its workforce. In the first week of the strike, TWA hired approximately 1,200 permanent replacements and thereafter, up to May 15, 1986, an additional 1,600, some 400 of whom were about to complete their training when the Union called off its unsuccessful strike. (59a, 60a) Those 1,600 permanent replacements, who attended TWA's training program during the strike, at TWA's facilities and under TWA's supervision, were paid by TWA as flight attendants, were covered by all employee benefit plans and began accruing flight attendant seniority on the day they entered training.

5 On March 5, 1986, just prior to the strike, IFFA filed an action in the district court (No. 86-6030-CV-SJ-6) alleging violation by TWA of the RLA by failing to bargain as required by Section 2, First. In that action, IFFA seeks, among other things, a return to the *status quo* conditions on and before March 6, 1986, and the reinstatement of all full-term strikers. That action is pending in the district court, awaiting decision on TWA's motion to dismiss at the close of plaintiff's case.

Some 1,280 crossover flight attendants were also working on May 17, 1986 (61a), when IFFA, on behalf of striking flight attendants, offered to return to work—although there was no back-to-work agreement and no successor agreement to the 1981-1984 Agreement. There were fewer than 200 flight attendant vacancies to be filled at that time; TWA filled those vacancies by rehiring strikers.

The District Court Decision

IFFA commenced this action by filing a complaint on May 30, 1986 in the district court. Jurisdiction was invoked pursuant to the RLA (45 U.S.C. §§ 151 *et seq.*) and Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337).

IFFA's first amended complaint alleged two claims. In Count I, the Union sought a declaratory judgment and appropriate injunctive relief requiring TWA, as of May 17, 1986, to reinstate approximately 3,000 full-term strikers, displacing some 1,200 replacements hired during the first week of the strike and the last 400 hired before May 17, 1986, as well as all the crossovers, on the ground that the flight attendants to be displaced were not permanent replacements. In Count II, IFFA sought similar relief, as to all replacements, on the ground that TWA had no business justification for hiring permanent replacements. On July 21, 1986, IFFA moved for partial summary judgment solely on Count I; TWA's cross-motion for partial summary judgment was also limited to Count I.

In deciding the cross-motions for partial summary judgment, the district court divided the permanent replacements into two groups, splitting off the approximately 463 flight attendants who were in various stages of completing training on May 17, 1986. Relying on the seminal decision of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) ("*Mackay Radio*"), the district court held that fully-trained new hires could not be displaced by economic strikers. It created, however, what it characterized as an unprecedented " 'training school exception' to the *Mackay Radio* rule" (40a)

that would permit strikers to displace the permanent replacements who had not quite completed their training on May 17.

With respect to the crossovers, relying on the principles of *Mackay Radio* and upon this Court's decision in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("*Erie Resistor*") that "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers," the district court held that none of the crossovers were subject to displacement by unreinstated strikers. (25a)

The court stayed its order for the displacement of the flight attendants in training, pending appeal, because it believed the issue to be "close and lacking in precedent." (40a)

The Court of Appeals Decision

Citing *Mackay Radio*, the Eighth Circuit affirmed[6] the district court's judgment that the new hires, other than the "trainees," were employed as permanent replacements and therefore were not subject to displacement by returning economic strikers. It rejected the district court's formulation of a "training school exception" for permanent replacements, which allowed a two-day period after the end of the strike for completion of training (14a), but nevertheless affirmed the decision that the flight attendants in training were subject to displacement by returning strikers. The Eighth Circuit's curious rationale—which had not even been argued[7]—was that the flight attendants in training, although on TWA's payroll and treated in all respects as employees, were not "employees" under the RLA. (11-12a) Alternatively, applying a so-called "balancing test" that it purported to find in *Mackay Radio*, the court concluded that unreinstated strikers were entitled to the positions held by the trainees because TWA had shown "no

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6 The Eighth Circuit had jurisdiction, under 28 U.S.C. § 1292(a), to review the district court's decision because it both granted and denied injunctive relief.

7 The parties stipulated that the flight attendants in training "were hired as TWA employees on their first day of training." (60a)

business justification" for continuing to employ the replacements after the strike ended. (13-14a)[8]

The court below acknowledged that the "trainees" had actually been hired as permanent replacements for striking flight attendants, had been paid flight attendant salaries, had received all flight attendant benefits and had accrued flight attendant seniority. (2-3a)[9] It held, however that

> The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the *payment of salary*. [Emphasis added] Rather, RLA coverage is determined by the *work the person performs* [emphasis in original] under supervision of the employer. (12a)

The court found that the "trainees" had not performed work for TWA "by any stretch of the imagination" (12a)—although their training was essential to TWA, and the National Mediation Board, the agency charged with the primary responsibility of determining who are employees under the RLA, has held that trainees in the employ of a carrier are "employees." *Scheduled Skyways*, 10 N.M.B. 488 (1983) (reprinted as Appendix K).

Proceeding on its unprecedented course, the Eighth Circuit reversed the district court's holding with respect to the cross-overs, reasoning that the crossovers could not be "considered permanent replacements" because, under its decision in the TWA Action, "the union security clause . . . remains in effect . . ." and "all cross-overs must retain their union membership." (7a) Therefore, it said:

8 The Union's claim that TWA did not have a business justification for treating new hires (including the "trainees") as permanent replacements was contained in a separate Count II of the complaint and was not even before the district court on the parties' cross-motions for summary judgment, which were limited to Count I.

9 It also acknowledged that "[t]he training of new people to fill strikers' positions was appropriate in fulfilling TWA's [legitimate] interest." (13a)

> . . . TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity. (7a; footnote omitted)

The court below relied on *Erie Resistor*, where this Court prohibited the grant of "super-seniority" to those who worked during a strike while holding that an employer need not discharge those employees in order to provide places for strikers.[10] At no point in its opinion did the Eighth Circuit identify the source of its apparent view that strikers are entitled to reinstatement in seniority order, or make any mention of the district court's finding that the 1981-84 contract between IFFA and TWA "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (22a) Nor did it acknowledge that TWA had done nothing to give the crossovers the kind of preferential treatment disapproved in *Erie Resistor*, but simply left them in the jobs to which they returned during the strike.

The court stayed its mandate pending certiorari proceedings. (17a)

REASONS FOR GRANTING THE WRIT

Both aspects of the decision below establish novel and irrational departures from well understood and long accepted relationships between management and labor, strikers and non-strikers and the Railway Labor Act and the National Labor Relations Act. Until this case,

- No court or administrative agency has suggested that positions occupied by early returning strikers must be treated as available vacancies at the end of a strike;

10 The super-seniority granted in *Erie Resistor* would have applied in the event of future layoffs after full-term strikers had returned to work; it had nothing to do with the right of the crossovers to remain in their jobs at the end of the strike.

- It has been a settled principle that strikers have no right to be reinstated in seniority order, absent a back-to-work agreement so providing;
- No court or administrative agency, under the RLA or the NLRA, has required the displacement of permanent employees in order to make room for returning economic strikers (*cf. International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), discussed *infra*, pp. 16 n.15, 28);
- Neither the courts nor the National Labor Relations Board has applied the "balancing test" that the Eighth Circuit purported to find in *Mackay Radio*, or required an employer to show "business justification" for continuing to employ permanent replacements after a strike ends;
- Neither the courts nor the National Mediation Board has concluded that employees in training are not "employees" within the meaning of the RLA; and
- No case has held that permanent replacements for economic strikers must forfeit their jobs to returning strikers unless the replacements are fully trained before the strikers offer to return to work.

Thus, the decision below radically alters the balance of bargaining power between management and unions, distorting and misapplying this Court's decisions in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

The practical effects of the Eighth Circuit's unprecedented and illogical decision are to deprive TWA (and other employers) of one of the principal self-help weapons in response to a strike (*i.e.*, the right to retain employees who choose to work during a strike) and to diminish the right of some 1,300 flight attendants in this case (and future crossovers in other cases) to refrain from engaging in concerted activity against their employer so as not to put their jobs at risk. It also creates the anomaly that employees newly hired as replacements for

strikers after the strike begins (who have minimal length of service) need not yield to strikers' job claims (unless they have not completed training), but employees with years of service, who exercised their right not to join the strike (or to abandon it and return to work before the strike ended) must yield their jobs to the same strikers.[11] The Eighth Circuit's decision, if not reversed, will eliminate the principal motivation that employees in a bargaining group who are "junior" to strikers have to return to work during a strike, and will force employers to replace strikers with new hires rather than have the benefit, during a strike, of the services of the willing experienced employees they would prefer.[12]

The Eighth Circuit acknowledged that "economic strikers are entitled to reinstatement only as vacancies occur," and that an employer "is not required to discharge permanent replacements in order to rehire striking employees." (5a) It failed to cite any authority, because there is none, for the view that TWA was obligated to *create* vacancies for "full-term strikers" (*i.e.*, those who did not return during the strike) by displacing permanent employees—whether new hires, earlier returning strikers or non-strikers. Purporting to rely on *Mackay Radio*, the court below nonetheless held that only new-hire permanent replacements, not crossovers, could retain their jobs at the end of a strike—and then only if the Union does not call off its

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11 Under the Eighth Circuit's reading of *Mackay Radio* and *Erie Resistor*, if the 100 most junior employees in a workforce of 200 choose not to strike, and if the employer hires replacements for the 100 strikers, the workforce at the end of the strike must be reconstituted to consist solely of the strikers and the newly hired striker replacements. Thus, the employees who did *not* strike lose their jobs as the result of the employer's decision to replace those who did! This Court cannot have intended *Mackay Radio* and *Erie Resistor* to have such a bizarre result.

12 Crossovers could avoid displacement at the end of the strike, under the Eighth Circuit's holding, only by quitting their jobs, forfeiting their seniority for all purposes and returning to work as new-hire replacements. The unlikely prospect of that event highlights the illogic of the holding below, as well as the extent to which it would impermissibly interfere with the right of a carrier to operate during a strike and the rights of its employees to refrain from engaging in concerted activity.

strike before the permanent replacements have completed their training. In effect, the Eighth Circuit thus gave the Union a back-to-work agreement that it had not negotiated and could not win for itself.

This Court should review and reverse the decision below because (1) it is contrary to the decisions in *Mackay Radio* and *Erie Resistor*; (2) it is in conflict, on the crossover ruling, with the decisions of the Sixth Circuit in *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) and *NLRB* v. *American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987), and of the Seventh Circuit in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982); and, on the trainee issue, with the decisions of the Second Circuit in *H.F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) and of the Seventh Circuit in *NLRB* v. *Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983); (3) it misinterprets provisions and decisions under the National Labor Relations Act and the Railway Labor Act and erroneously applies concepts and provisions of one Act to the other, unsettling decades of firmly established national labor policy; and (4) it is based on an incredible series of misstatements of law and fact and thus so far departs from "the accepted and usual course of judicial proceedings" as to call for the immediate exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

I. THE EIGHTH CIRCUIT'S DECISION THAT CROSSOVER FLIGHT ATTENDANTS MUST BE DISPLACED BY FULL-TERM STRIKERS WITH MORE "SENIORITY" IS CONTRARY TO PRINCIPLES ESTABLISHED BY THIS COURT.

For fifty years federal labor law, under the National Labor Relations Act, has struck a delicate balance between the employee's right to strike and the employer's right to continue to operate during a strike. *See NLRB* v. *Mackay Radio*, 304 U.S. 333, 345-46 (1938); *NLRB* v. *Erie Resistor*, 373 U.S. 221, 232-34 (1963); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 524-28 (1983) (Brennan, J., dissenting). The Eighth Circuit's unprecedented and unsupportable decision misconstrues the NLRA precedent on which it purports to rely, radically upsetting that carefully crafted and maintained balance, and then compounds the error by applying the misstated NLRA law to the Railway Labor Act.

In *Mackay Radio*, 304 U.S. at 345-46, this Court announced the fundamental principle, uniformly followed by the courts until now, that an employer has

> the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them . . . . [It is] not an unfair labor practice . . . *to reinstate only so many of the strikers as there [are] vacant places to be filled.* (Emphasis added; footnote omitted)

This fundamental decision was not limited to replacement of strikers by newly hired employees. Its whole import is that strikers are entitled to be reinstated only to the extent that there are vacant places to be filled. The choice of incumbent employees not to join a strike or to refrain from supporting it for its duration prevents the creation of vacancies in the positions held by those employees. There is nothing in *Mackay Radio* that gives strikers, when the strike is called off, the right to treat those occupied positions as vacancies. Nor is there anything in the decision that contemplates that strikers may use their pre-strike seniority to displace from those non-vacancies the employees who are occupying the jobs.

In fact, the very replacements at issue in *Mackay Radio* were crossovers. They were employees at the time of a nation-wide strike against the company, who chose not to join the strike and were transferred to a location where their services were needed. *See* 1 N.L.R.B. 201 (1936). This Court's later decision in *Erie Resistor*, moreover, makes clear that the term "permanent replacement," as used in that decision and subsequently, is

not confined to new hires but includes any permanent employee who worked during the strike. Thus, the Court said:

> Under the decision . . . [in *Mackay Radio*] an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. 373 U.S. at 232.

And then further describing the *Mackay Radio* decision, the Court said: "[T]he employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers . . . ." *Id.*

The conclusion is inescapable, therefore, that the Court included in the category of "permanent replacement" all "those who worked during the strike" as permanent employees and not just those who were newly hired to fill places left vacant by strikers.[13] If all the employees of a company went out on strike when it began and, during the strike, half of the positions were filled by new-hire permanent replacements and the other half by early returning strikers, the Court cannot have intended that somehow half of the positions still remained to be filled by strikers when the strike is called off. In construing NLRA § 2(3), which has no parallel in the RLA, the Court went no further than to say that it "preserves to strikers their *unfilled* positions and status as employees during the pendency of a strike." 373 U.S. at 233 (emphasis added).

On May 17, 1986, when IFFA offered to return to work "on behalf of all . . . employees . . . who went on strike and have not returned to work to date" (51a, 59a), fewer than 200 places were vacant, the remainder having been filled by new-hire permanent replacements and crossovers. Ignoring decades of authority holding that economic strikers are entitled to reinstatement only "[i]f and when" vacancies are available, *see, e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381

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13 *See also* the Third Circuit's decision in *Erie Resistor*, 303 F.2d at 360, where the court described the "replacements" as "includ[ing] new employees, employees on layoff status and returning strikers."

(1967),[14] the court below announced the astonishing new rule that vacancies must be created for economic strikers by displacing employees who exercised their right either not to strike or to return to work during the strike at a time when vacancies existed.

The Eighth Circuit's fundamental misconception of the law is demonstrated by its repeated statement that TWA had "accorded," "rewarded" or "granted" crossovers "permanent replacement" status. TWA did not award permanent status to the crossovers; they were permanent employees before the strike started. They did not need to be "replacements" for others; they simply continued to work for TWA, thereby preventing vacancies in the jobs they occupied. No principle of law, logic or labor policy can be found to justify the displacement from their jobs of permanent employees who work during a strike. *Mackay Radio* clearly gives the employer the right to fill places left vacant by strikers; that principle cannot be distorted into a rule of law that strikers may claim jobs not left vacant but, rather, filled by non-strikers.

II. THE DECISION BELOW IS IN CONFLICT, ON THE CROSSOVER ISSUE, WITH THE SIXTH AND SEVENTH CIRCUITS AND, ON THE TRAINEE ISSUE, WITH THE SECOND AND SEVENTH CIRCUITS.

A. Crossovers

In *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), in contrast to the decision of the court below, the Sixth Circuit held that an employer could not be compelled to permit strikers to exercise their pre-strike seniority to obtain full-time (rather than part-time) jobs, in preference to replace-

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14 *See also Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (where the court stated that strikers "are entitled to reinstatement as vacancies arise, although they may not displace permanent replacements"—making no distinction between the 7 crossovers and the 23 new-hire replacements before it); *Lodges 743 and 1746, International Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) ("No case insofar as we are aware, has required an employer to lay off its active employees so as to make room for strikers.").

ments *and earlier returning strikers*. The Sixth Circuit thus clearly held that strikers could not displace crossovers.

In its very recent decision, *NLRB* v. *American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987) (*reprinted in* 160 Daily Lab. Rep. (BNA) D-1), the Sixth Circuit again confirmed that crossovers who worked during a strike need not yield their jobs at the end of the strike to more senior strikers. The court went even further and said that the employer could use a chronological list of employees who offered to return during the strike when there were no vacancies, to fill vacancies that arose *after* the strike. (On the latter point there was a dissent, but that question is not in this case.) The Sixth Circuit's approval of the reinstatement of strikers in the order in which they offered to return to work, reaffirms the conflict between that circuit and the Eighth Circuit which was created by the decision below. The novelty of the Eighth Circuit's ruling, moreover, is established by the reference of the Sixth Circuit to the concession of union counsel there that "use of the chronological list was lawful during the strike." 160 Daily Lab. Rep. (BNA) at D-3.

The court below said that "*Giddings* [*& Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982)] in no way casts doubt on the rule that cross-overs returning to their old positions are not permanent replacements." (9a)[15] *Giddings*, however, does not address the question whether crossovers are permanent replacements; it holds that reinstated strikers (*i.e.*, crossovers) as well as permanent replacements, may be recalled in preference to unreinstated strikers with greater seniority if those crossovers are furloughed before the more senior strikers have been

15 If that "rule" was announced by *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), it is—as the dissent points out (471 F.2d at 700)—contrary to the use of the term "permanent replacement" in *Mackay Radio* and *Erie Resistor* to include all "those who worked during the strike," crossovers as well as new hires. In *J.L. Clark*, moreover, a strike settlement agreement required the employer "to reinstate striking employees on a seniority basis." 471 F.2d at 697. Finally, if the question here is whether the crossovers occupied their own jobs or those of the strikers, the Eighth Circuit should have remanded for that factual determination, as the majority did in *J.L. Clark*.

reinstated. If the so called "rule" that the court below announces were correct, the crossovers in *Giddings* could not have remained in their jobs long enough to be furloughed before the more senior strikers were reinstated. The Eighth Circuit's rule would have required the displacement of crossovers by the more senior strikers the moment the strikers requested reinstatement.

The unexpressed but necessarily underlying premise of the court below is that, following an economic strike, employees have a right to exercise the seniority they had under the old contract for limited, specific purposes (which did *not* include return from a strike (22a)) to claim the jobs of employees who chose not to strike. Absent a back-to-work agreement providing therefor, there simply is no such right. It is, moreover, a "settled principle that an economic striker has no statutory right to be recalled by seniority," even when there are vacancies. *Bingham Willamette*, 282 N.L.R.B. No. 165, slip op. at 6 n.5 (1987).[16]

B. Flight Attendants in Training

Apparently recognizing the invalidity of the district court's rationale for holding that the flight attendants in training when the strike ended were not "permanent replacements," the court below expressly declined to adopt the district court's "two-day rule" (14a) and made no mention whatsoever of its "'training school exception' to the *Mackay Radio* rule" (40a). Instead, the Eighth Circuit affirmed the district court on the novel ground that the flight attendants in training were not "employees" within the meaning of the Railway Labor Act. (11-12a) Alternatively, it purported to apply "the rationale of NLRA decisions" and a "balancing test" that it discerned in *Mackay Radio* to conclude that "unreinstated strikers are entitled to

16 *See also, e.g.*, NLRB v. *Wells Fargo Armored Service Corp.*, 597 F.2d 7, 10 (1st Cir. 1979); *Indiana Desk Co.*, 276 N.L.R.B. 1429, 1447 (1985); *Kennedy & Cohen of Georgia, Inc.*, 218 N.L.R.B. 1175, 1175-76 (1975); *Bio-Science Laboratories*, 209 N.L.R.B. 796 (1974).

those positions now held by the . . . trainees" (14a), because the trainees were not permanent replacements.

According to the Eighth Circuit, it is "irrelevant" (12a) that the flight attendants in training had actually been hired by TWA as permanent employees. Nor is it of any import that they were being paid at flight attendant rates of pay, were covered by all employee benefit plans, were accruing flight attendant seniority, were participating in required training at TWA's facility, and were subject to TWA's supervision and direction.[17] Even given all that, the court below said, employees in training are not, "by any stretch of the imagination" (12a), performing services for TWA and, therefore, were not "employees" within the meaning of the Act.

That holding is contrary to the rulings of the National Mediation Board—the agency with the primary jurisdiction to administer and interpret the RLA—that trainees are "employees" under the RLA when, like the flight attendant trainees in this case, they receive the same pay and fringe benefits as other employees in the craft or class, even if they are still in ground

17 The court relied on the inapposite decision of the Seventh Circuit in *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), as "dispositive", saying that the Seventh Circuit "rejected the rationale upon which TWA relies" (10-11a)—while acknowledging that "the circumstances surrounding the pilot trainees in *ALPA* differ from the situation here" (12a), principally in that those pilots were not hired. Since the Seventh Circuit's decision was based on facts precisely opposite to the facts of this case, that court obviously cannot be said to have rejected TWA's rationale.

The court below also ignored that the issue in *ALPA* v. *United*, *supra*, was *not* whether the "Group of 500" were strike replacements who could be retained in the employ of the carrier when the strike ended, but whether they had ever become "employees" entitled to protection under Section 2, Fourth of the RLA (45 U.S.C. § 152, Fourth). As demonstrated at pp. 20-21, *infra*, a replacement who has been offered and accepted permanent employment during a strike need not be an "employee" before the strike ends in order to be a "strike replacement." *See also ALPA* v. *United Air Lines*, 616 F. Supp. 849, 850-51 (N.D. Ill. 1985), amending 614 F. Supp. 1020 (N.D. Ill.), where Judge Bua—emphasizing that the time of commitment of permanence to replacements is controlling — held that another group of 539 pilots, who *were* hired, were permanent replacements even though fewer than half of them had even begun training before the end of the strike.

school training at the time in question. *Scheduled Skyways*, 10 N.M.B. 488 (1983).[18] Thus, concluding that employees in ground school training, even if employed by the carrier in every common sense and common law meaning of the word, "cannot be considered employees within the meaning of the RLA" (12a),[19] the Eighth Circuit eliminated, with a few conclusory paragraphs, the organizational and representational rights of an untold number of employees who have heretofore enjoyed the protections of the Act.

Through its selective use of NLRA authority, the Eighth Circuit also ignored substantial and long standing precedent holding that it is immaterial whether a permanent replacement has completed a required training period before strikers re-

18 *Compare Air Micronesia*, 10 N.M.B. 11 (1982) (holding that trainees who had never been on the payroll of the carrier and had not been offered employment almost two years after completing training were not employees under the RLA).

19 As supportive of its conclusion, the court below blindly stated that "if the trainees were to be considered as employees, they would need to join the Union and pay dues" (12a)—although their training period was only seventeen days and the Act plainly prohibits the compulsory payment of union dues any earlier than "sixty days following the beginning of . . . employment." (45 U.S.C. § 152, Eleventh(a)) Contrary to its implication, moreover, the Eighth Circuit did not address the question whether "trainees," as opposed to other permanent replacements, were required to pay dues, in its decision in the TWA Action. (12a)

Equally spurious is the Eighth Circuit's speculation—without regard to the facts of this case—that "accord[ing] the trainees employee status . . . would allow an employer to amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended." (13a) It is undisputed in this case (i) that TWA ceased recruiting strike replacements on April 25, 1986—over three weeks before IFFA decided to end its strike; (ii) that TWA was required to hire and train the flight attendants in question beginning in late April and early May—while IFFA was still on strike—in order to have a full complement of flight attendants by peak season in June; and (iii) that there were nearly 200 vacancies in the flight attendant workforce at the end of the strike—to which full-term strikers were reinstated. Clearly, there is no basis in this record for any inference—especially on a motion for summary judgment—that TWA was "amass[ing] a trainee pool" (13a) in order to defeat the right of strikers to reinstatement.

quest reinstatement.[20] In any event, insofar as it purports to rely on NLRA precedent and not its strained definition of "employee" under the RLA, the decision below conflicts with the decisions of the Second and Seventh Circuits in *H.F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) and *NLRB* v. *Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983).

The Second and the Seventh Circuits have held that permanent strike replacements are hired when an offer of permanent employment has been made and accepted and, once hired, are not subject to displacement by returning strikers even if the replacements have not actually become employed before the strikers request reinstatement.[21] As Judge Friendly wrote for the Second Circuit in *H.F. Binch Co.*, structuring a test for determining when a permanent replacement has been hired,

> [T]he . . . question of just what circumstances constituted a hiring to fill the place of strikers . . . must be answered in a practical frame . . . . On the one hand, a mere offer, unaccepted when the striker seeks reinstatement, is insufficient to qualify; on the other, actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date . . . . *[A] replacement has been obtained if, but only if, both the employer and the replacement understand that the latter has accepted the vacant position before the replaced striker offered to return to work* . . . . 456 F.2d at 361-62 (emphasis added; citations omitted).

20 *See, e.g., C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1209-10 (1969), *enforced*, 427 F.2d 983 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964); *Bowman Transportation, Inc.*, 142 N.L.R.B. 1093, 1098 (1963); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958); *The Texas Co.*, 93 N.L.R.B. 1358, 1391 (1951), *review granted on other grounds*, 198 F.2d 540 (9th Cir. 1952); *see also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983).

21 *See also Home Insulation Service*, 255 N.L.R.B. 311, 312 n.9, *enforced without opinion*, 665 F.2d 352 (5th Cir. 1981) ("striker replacement applicants . . . who have not yet reported for work . . . obtain the status of striker replacements upon their acceptance of offers of permanent employment"); *L. E. M., Inc.*, 198 N.L.R.B. 694, 695 (1972) ("if an employer makes a commitment to an applicant for a striker's job, . . . that hire [is] a legitimate replacement even though the striker requests reinstatement before the replacement actually begins work") (footnote omitted).

Similarly, in *NLRB* v. *Cutting, Inc.*, *supra*, the Seventh Circuit held that strike replacements were "hired" before strikers requested reinstatement because the replacements had been offered and accepted permanent employment before the strike ended. The court so held even though the replacements did not actually become employed until two days following the strikers' offer to return to work and were required to pass a physical examination before they became employed, which the employer was unable to schedule before the strike ended. 701 F.2d at 661-62, 669.

In contrast, the Eighth Circuit has now held that replacements who had not only accepted offers of permanent employment, but were actually employed by TWA—some for as long as two weeks, with three more days to go to complete training—when IFFA ended its strike, were not permanent replacements and, therefore, that unreinstated strikers are entitled to their jobs. (10-14a) At no point, other than by a distortion of this Court's decision in *Mackay Radio* (*see* pp. 23-24, *infra*), did the court below suggest any basis for affording *less* protection against displacement to replacements (like the flight attendants in question here) who accept permanent jobs and begin their employment before the strikers seek reinstatement, than to those who are promised jobs but have not become employed by the end of the strike.

Neither the Eighth Circuit's result-oriented definition of "employee" (11-13a) nor its so-called "balancing test" (13-14a) justifies the displacement of some 400 permanent replacements who were offered, accepted *and entered* employment before the Union decided to end its strike. "Protection of the right to strike [simply] does not require going so far." *H.F. Binch Co.*, 456 F.2d at 362.

III. THE DECISION BELOW DISTORTS *MACKAY RADIO* AND *ERIE RESISTOR* AND APPLIES THAT DISTORTION TO THE RAILWAY LABOR ACT; IT ALSO IGNORES CONTRARY NATIONAL LABOR RELATIONS BOARD PRECEDENT.

The decision below is a total distortion of this Court's determination in *Mackay Radio* of the limitations on an economic striker's right to reinstatement at the end of a strike. This Court said, plainly and unmistakably, in *Mackay Radio*:

> The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. 304 U.S. at 346.

The Court, in other words, said two things: (i) that strikers are entitled to be reinstated only to vacant places; and (ii) that places occupied by those who accepted employment with assurances that their positions were permanent, are not vacancies. *A fortiori*, the Court did not need to say that places occupied by persons who were permanent employees at the time the strike began, either because they never left those places or because they returned to them while the strike was in progress, were not vacancies.

The court below completely ignores the explicit requirement in *Mackay Radio* that a vacancy must exist before there is any right to reinstatement.[22] It ignores, too, that *Mackay Radio* is expressly based upon Section 2(3) in the NLRA, which provides:

> The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not

22 The majority in *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), apparently made the same mistake, as the dissent in that case by Judge Pell pointed out.

> obtained any other regular and substantially equivalent employment . . . . 304 U.S. at 345.

Under *Mackay Radio*, even a striker explicitly defined as an employee under the NLRA has no right to reinstatement in the absence of a vacancy. The court below, however, held that a striker under the Railway Labor Act, who is not defined in that Act as an employee, has greater rights, *i.e.*, the right to remove an employee from his job supposedly because they are both union members. Apart from the fact that the Railway Labor Act confers no such right, the decision below contradictorily acknowledges that the "cross-overs have apparently ceased their union memberships except for payment of dues." (8a)

In administering the NLRA, moreover, the National Labor Relations Board has consistently interpreted that Act so as to raise no question about the right of crossovers to remain in their jobs at the conclusion of a strike even though more senior strikers remain unreinstated.[23] In *Randall, Division of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), for example, neither the Board nor the Eighth Circuit itself raised any question about the right of crossovers to remain in their jobs. In cases like *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), the Board had no problem with the right of crossovers to retain their jobs; what it held to be objectionable was the grant of benefits to crossovers that would persist *after* more senior strikers had returned to their jobs. Just so, this Court in *Erie Resistor* held objectionable the award of "super-seniority" to crossovers and permanent replacements, to be exercised in the future against reinstated strikers, but did not deny the right of the crossovers to keep their jobs without super-seniority.

23 As explained in a recent publication by the Practising Law Institute: "Junior employees who worked through the strike or returned early may continue their employment even if it results in senior economic strikers remaining unreinstated at the end of the strike." M. Hutcheson, *et al.*, *Employer's Guide to Strike Planning and Prevention* 346 (1985).

Equally novel and unprecedented is the Eighth Circuit's use of *Mackay Radio* as an alternative route to the result it reached with respect to the flight attendants in training when the strike ended. The court below misread *Mackay Radio* as authorizing the courts to use a "balancing test" (13a) to determine whether permanent replacements may retain their jobs at the end of the strike—when *Mackay Radio* actually announced a clear rule that permanent replacements need not be displaced to make room for returning economic strikers. 304 U.S. at 345-46. In the fifty years since then, no other court has found in *Mackay Radio* authority to apply the so-called "balancing test" that the court below purported to find there; nor has the National Labor Relations Board.

The court below also concluded that the honoring of assurances of permanence to strike replacements does not constitute a "business justification" for failing to reinstate strikers (14a)—when this Court has held squarely to the contrary. *See, e.g., Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for his refusal to reinstate strikers.") (citation omitted); *see also NLRB* v. *Brown*, 380 U.S. 278, 292 n.6 (1965) (It is the employer's "prerogative to hire permanent replacements for strikers."); *Harding Glass Industries, Inc.* v. *NLRB*, 672 F.2d 1330, 1338 (10th Cir. 1982) ("If permanent replacements have been hired before strikers make an unconditional offer to return to work, the employer has a legitimate and substantial justification for refusing to reinstate the strikers."); *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 929 (7th Cir. 1982) ("*Mackay* eliminates the need for any case-by-case application of the [business need] test to justify the hiring of permanent replacement workers.").

IV. THE EXTRAORDINARY RELIANCE OF THE COURT BELOW ON MISSTATEMENTS OF LAW AND FACT IS SUCH AN EXTREME DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS AS TO WARRANT SUMMARY REVERSAL BY THIS COURT.

The opinion below on the questions here presented is so dependent upon incontestably erroneous statements of law and fact that if they were deleted from the opinion nothing would remain to support its results. Because those results, moreover, are so contrary to the law established by this Court, other courts of appeals, and the cognizant administrative agencies, the decision below on the issues raised in this petition should be summarily reversed, in accordance with Rule 23.1 of this Court.

1. In perhaps the most incomprehensible and specious aspect of its rationale, the Eighth Circuit bases its decision on the union security clauses that it has previously held continued in effect. Those clauses, which simply required payment of union dues as a condition of continued employment, cannot be treated as a substitute for a back-to-work agreement or as the equivalent of a union rule establishing the right, as among the covered employees, to exercise seniority to displace less senior employees from the jobs they hold.

Seniority, moreover, is not a creature of internal union rules, but of contract between employer and union. The 1981-84 TWA-IFFA contract made no provision for the use of seniority in the way in which the court below directed. The emphasis by the Eighth Circuit on the concept of "union members" "working together under the union security clause" (7-9a) is simply rhetoric and has no foundation in fact, since the union security clause has neither the purpose nor the effect of governing relationships among employees, and it does *not* require them to be union members.[24]

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24 The Eighth Circuit says that "[u]nder the union security clause . . . [of the 1981-84 Agreement] all flight attendants working for TWA were required to be union members. . . ." (4a) Article 24(A), however, specifically

(footnote continued)

2. The Eighth Circuit cites RLA Section 2, Eleventh as "authorizing 'closed shop' agreements" (7a) and, as its "most important[ ]" reason for concluding that the crossovers are subject to displacement, relies upon a so-called "closed shop agreement" between TWA and the Union (7a). It is clear beyond question, however, that such agreements are unlawful under both the RLA and the NLRA[25] and, in any event, that no such provision was contained in the TWA-IFFA agreement.

3. The court below makes the truly remarkable assertion that "new hires cannot be the subject of discrimination based upon union loyalty and activity" (7a n.4)—thereby removing from the protection of RLA Section 2, Third and Fourth (and apparently NLRA Section 8(a)(3) as well) all newly hired employees.

4. The court below says that under this Court's decision in *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95 (1985), "[U]nion members may resign from all obligations except that of paying dues. . . ." (8a) That case, however, does not deal with resignation by union members from obligations, but from *membership* in the union.

5. Persisting in confusing non-members with members, the court proclaims the *non sequitur* that "if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status." (8a) A union *may* fine its "members." And it is clear that even if the *Pattern Makers'* case does not apply to the RLA—and the court below was willing to assume that it did—the record does not establish that there was anything in this Union's constitution that prohibits resignation during a strike; therefore, the question whether this Union may fine the cross-

provided that "[f]or the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee . . . of dues for each calendar month and initiation fees . . . which are uniformly required of members. . . ." (63a)

25 See C. Morris, *The Developing Labor Law* 1362 (1983); R. Gorman, *Basic Text on Labor Law* 641-42 (1976).

overs who resigned their membership[26] before they went back to work does not arise. TWA, moreover, did not "reward" the crossovers with permanent replacement status; it simply allowed them to remain in their jobs.

6. The court said that "the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity." (8a) Nothing that this Court said in *Erie Resistor*, however, or in any other decision, even suggests that it is "discrimination" on the basis of "union activity" for an employer to decline, at the conclusion of a strike, to displace those who worked during the strike in order to create places for returning strikers.[27]

7. While the court below recognizes that what this Court disapproved in *Erie Resistor* was "an award of super-seniority to permanent replacements and cross-overs" and that "TWA has not awarded super-seniority to the employees who worked during the strike" (8a), it nonetheless says that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here." (8a) Those concerns were that super-seniority (in the event of future furlough) "offered an inducement to abandon the strike" and "created a long-term division among the work force." (8a) The court below purported to find the same concerns present here. It said that treating the crossovers as permanent replacements "differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long term conflict and division within the work force of those working together under the union security clause." (9a) But TWA did not "differentiate" among employees; the crossovers exercised their right to continue in, or resume their jobs. TWA

26 The Eighth Circuit says that new hires "were not union members when they began work during the strike." (7a n.4) Neither were the cross-overs, since the court itself says that "cross-overs have apparently ceased their union memberships except for payment of dues." (8a)

27 In another egregious distortion of the law, the court below asserts that to allow crossovers to remain in their jobs when the strike ended is akin to awarding them "super-seniority," a proposition that is on its face contrary to the meaning of that term as used in *Erie Resistor*. *See* footnote 10, *supra*.

did not "induce" them to abandon the strike; they had the free choice of whether or not to join the strike or continue supporting it. And, as to long term conflict and division within the work force, it is ludicrous for the court below to suggest that nothing but harmony will prevail between the crossovers and the strikers who take their jobs or between the strikers and the new hires who were permanent replacements for the strikers.

8. Contrary to the statement of the court below, *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), did not say that the "nature of the benefit conferred on cross-overs was irrelevant." (9a) That case disapproved of benefits and discriminatory treatment that would persist *after* all the strikers had returned to work. In that case, moreover, the employer had agreed, in a settlement agreement, to take back all the strikers as though the strike had been an unfair labor practice strike. The *George Banta* case followed *Erie Resistor* in holding that non-strikers may not be afforded preferential treatment that will differentiate them from strikers *after* the strikers have returned to work.

9. Finally, one of the more arcane and disingenuous pronouncements of the court below is its statement that the Seventh Circuit in *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), has "recently approved reliance on [*International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972)]." (9a) The Seventh Circuit, at the page indicated, does not even cite to the *J.L. Clark* case. It does say that non-strikers cannot be awarded positions which they did not occupy during the strike, in preference to more senior strikers. The district court in the *United* case had cited *J.L. Clark* in support of that proposition, but there is no claim here that the crossovers did not occupy flight attendant positions during the strike. Contrary to the implication of the court below, the Seventh Circuit did not approve the statement of *J.L. Clark* that a crossover had to fill a position other than his own and, as noted above, the Seventh Circuit in *Giddings*, *supra*, plainly held that crossovers may retain their jobs at the end of a strike as against the claims of unreinstated senior strikers.

CONCLUSION

Lacking any rational or principled basis of support, the decision below is clearly contrary to this Court's decisions in *Mackay Radio* and *Erie Resistor* and to existing precedent and practice of the courts and administrative agencies concerned with the interpretation of the National Labor Relations Act and the Railway Labor Act. If allowed to stand, it will have the effect of massively shifting, for no good reason, the carefully weighted and long established balance of economic and negotiating power between employers and unions—before, during and after a strike—under both labor Acts. It also raises the spectre of potential imposition of retroactive liability for many millions of dollars in back pay simply as a result of the employer's exercise of the heretofore accepted right to leave permanent employees in their jobs when a union calls off an economic strike.

The decision, moreover, purports to be based on the Eighth Circuit's prior ruling that a union security clause survives the term of a Railway Labor Act agreement, although that clause cannot possibly be read as a back-to-work agreement or as conferring post-strike seniority rights. That case, therefore, has no conceivable applicability, whether it was correctly decided or not.

In sum, the decision below demonstrates so compelling a need for the exercise of this Court's power of supervision that it should be summarily reversed, under Sup. Ct. R. 23.1, on the issues presented by this petition. Each day that the decision is allowed to stand, its strange logic and egregious misstatements of the law will work predictable mischief on national labor policy by unsettling principles established by this Court decades ago, injecting new uncertainties into the collective bargaining process and spawning disputes and litigation over questions long viewed as settled. At the very least, this petition should be granted, in order to address the Eighth Circuit's departure from long accepted judicial and administrative application of the National Labor Relations Act and the Railway

Labor Act, purportedly based primarily on its earlier decision which is itself pending review in this Court in No. 86-1650.

Respectfully submitted,

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October 1, 1987

APPENDICES

APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-2197

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Appellee,

v.

TRANS WORLD AIRLINES, INC.,

Appellant.

K. C. INTERNATIONAL AIRPORT, K. C.

No. 86-2319

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Appellant,

v.

TRANS WORLD AIRLINES, INC.,

Appellee.

K. C. INTERNATIONAL AIRPORT, K. C.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: December 12, 1986

Filed: May 26, 1987

Before LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

BRIGHT, *Senior Circuit Judge*.

This appeal by Trans World Airlines, Inc. (TWA) and cross-appeal by the Independent Federation of Flight Attendants (the Union) arise from the district court's judgment determining the relative rights of strikers, new hires, cross-overs and trainees to continued employment and reinstatement following the 1986 strike by TWA flight attendants. The district court granted preference in employment to newly hired strike replacements and union members who crossed the picket lines, thereby preventing reinstatement of full-term strikers with greater seniority to those positions. For the reasons discussed below, we affirm in part and reverse in part. In essence, we grant preference in current employment only to the new hires.

I. BACKGROUND

The Union and TWA entered into a collective bargaining agreement establishing rates of pay, rules and working conditions. During the spring of 1984, the parties served upon each other notices of intended change under section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156. After extensive negotiations and following the statutory "cooling off" period, the parties were unable to agree on the changes to be made and the Union commenced a strike on March 7, 1986.

Upon commencement of the strike, TWA hired approximately 1270 new flight attendants and told them they were being offered permanent employment. These new hires were assigned seniority as of March 7, 1986. TWA also utilized approximately 1280 cross-over flight attendants (cross-overs) who were credited with their prior length of service plus whatever time they accrued by working during the strike.[1] Also

1 Cross-overs are those flight attendants who worked for TWA and were Union members prior to the strike. Some never went out on strike and others returned to work at various times during the strike. They kept their seniority as accrued prior to March 7, and also accrued additional seniority throughout the strike. At the end of the strike, they maintained their positions and TWA refused to displace them with returning full-term strikers with greater seniority.

during the strike, TWA continued to hire new flight attendants to meet expected demand. TWA advised these trainees that they were TWA employees as of the first day of training.[2] Approximately 463 trainees had not completed their training when the strike ended.

At 10:00 p.m. on May 17, 1986, the Union made an offer to return to work. Notwithstanding this offer, TWA retained its new hires and cross-overs as employees without replacement by any of those attendants who remained on strike for its duration. TWA later recalled striking flight attendants as the need then arose in order of seniority. In addition, TWA placed the 463 trainees into permanent positions when they completed their training, which was after the strike had ended. These trainees received preference in job placement over those flight attendants who had not returned to work for the duration of the strike.

The Union thereupon instituted this action in the district court claiming that TWA discriminatorily and unlawfully denied reinstatement to more than 2000 striking flight attendants after they had ended the strike and had offered to return to work.

In a previous appeal to this court arising out of this litigation, TWA challenged the continued viability of those portions of the collective bargaining agreement that were not subject to bargaining and intended change. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir.), *petition for cert. filed*, Apr. 14, 1987 (*TWA* I). Particularly at issue in the prior case was the duration of the agreement as to

2 Flight attendants are not qualified to service flights until they complete a training course and an operational experience flight. Prior to March 7, trainees attended the program on a tuition-paying basis and were not offered employment until after completion of the course. After the strike began, TWA placed the trainees on its payroll as of the first day of their training.

the union security and dues check-off provisions. We held in *TWA* I that the entire bargaining agreement did not expire just because the parties reached an impasse in their bargaining about certain items of compensation, expenses and bidding procedures. *Id.* at 490. This court also decided that the union security and dues check-off provisions of the bargaining agreement remained in effect because these provisions had not been reopened in the prior bargaining sessions. *Id.* at 492. Under the union security clause that had not been reopened, all flight attendants working for TWA were required to be union members and pay union dues in order to continue their employment with TWA.

These appeals challenge the district court's rulings on cross-motions by the Union and TWA for partial summary judgment. The district court held that the flight attendants in training when the strike ended were not permanent strike replacements and must yield their jobs to strikers who returned to work. The court decided that a permanent replacement must actually perform work within a reasonable period of time and that two days was a reasonable period. Because none of the 463 trainees had completed their final training flights within two days after the strike, they did not perform services within a reasonable period of time and could not be considered permanent replacements. TWA appeals this holding in No. 86-2197.

The district court also held that the cross-overs and new hires were entitled to retain their jobs as against the claims of strikers. The Union appeals this holding in No. 86-2319.

We affirm the determination that those flight attendants holding a trainee status at the end of the strike may not be retained over striking employees. We also affirm the district court's ruling that new hires may retain their jobs as against the claims of strikers. We reverse, however, as to cross-overs. They may not retain their positions as against strikers with greater seniority.

II. Discussion

Employees who are not working because of a labor dispute remain "employees" of the employer unless they obtain other work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378

(1967); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). When the labor dispute is economic in nature,[3] however, the employer may hire permanent replacements for strikers in order to continue business operations. *Mackay Radio*, 304 U.S. at 345-46. Once an employer hires permanent replacements, economic strikers are entitled to reinstatement only as vacancies occur. The employer is not required to discharge permanent replacements in order to rehire striking employees. *Id.*

A. *New Hires*

The district court held that the 1220 "new hires" who started work on and after March 7, 1986 were employed as permanent replacements and not as additions to the workforce. The district court reached its conclusion by considering the circumstances in which they were hired. The court noted that although TWA anticipated a need for new attendants regardless of a strike, once the strike began, TWA made clear that it was hiring new flight attendants to replace strikers. The new hires crossed picket lines to receive formal offers of employment and TWA had earlier informed them that if they were hired after a strike, they would be considered permanent replacements for striking employees. The court further held that the replacements' subjective understanding of their employment status was irrelevant, that is, the new hires did not need to know and understand their permanent replacement status.

The Union argues that returning strikers should have preference over new hires because the new hires were merely additions to the workforce. It contends that TWA actively recruited new attendants prior to the strike, informing them that they would be hired whether or not a strike occurred. According to

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3 An economic strike protects wages, hours, or terms and conditions of employment. An unfair labor practice strike protests an employer's commission of unfair labor practices. *George Banta Co. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982). For purposes of this lawsuit, the district court assumed, without deciding, that this strike was economic in nature. The question of whether the strike was economic or caused by unfair labor practices is the subject of separate litigation, now pending in the district court.

the Union, the new hires must be considered additions to the workforce, and not strike replacements. The Union also argues that no mutual understanding existed between the new hires and TWA that the new hires were permanent replacements for the strikers. Without a mutual understanding, the Union contends that the new hires cannot legally be deemed permanent replacements.

Although TWA's statements to new hires may have been ambiguous prior to the strike, the undisputed evidence clearly shows that once the strike began, TWA employed the new hires as permanent replacements for the strikers. These applicants were informed prior to the strike that they would be hired as strike replacements. These applicants crossed picket lines, and TWA advised them as to their role as strike replacements once they began to work. Thus, we conclude that the district court correctly determined that the 1220 new hires were employed as permanent replacements and thus were not subject to displacement by returning strikers.

We reject the Union's contention that a mutual understanding must exist between the new employees and TWA that the new hires are in fact permanent replacements. The Union argues that the new hires must have subjectively understood that they were permanent replacements in order to create the necessary mutuality of understanding.

The law, however, does not require mutuality. *NLRB v. Murray Products*, 584 F.2d 934 (9th Cir. 1978), upon which the Union relies, does not require mutual understanding. Rather, *Murray Products* holds that an employer's unilateral and undisclosed decision to designate new employees as permanent replacements is inadequate to actually accord them permanent status. *Id.* at 939. In the present case, TWA clearly communicated its decision to offer permanent employment to the new hires. Accordingly, the new hires are permanent replacements and striking employees may not displace them.

B. *Cross-overs*

The district court held that the approximately 1280 striking employees who "crossed over" and went back to work during the strike were also permanent replacements and not subject to displacement by full-term strikers with greater seniority.

The district court relied upon *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), in concluding that TWA could legitimately offer cross-overs permanent replacement status. The district court noted that *Randall* and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), are broadly protective of employees who work during a strike and that the offer of permanency to cross-overs did not discriminate on the basis of union activity.

Upon examination of the applicable law, however, we cannot agree with the district court's assessment. Most importantly, the terms of the bargaining agreement prevent the cross-overs from being considered permanent replacements. In *TWA I*, *supra*, this court decided that those portions of the agreement not opened for bargaining were not terminated at impasse, but remained in effect. 809 F.2d at 492. Accordingly, the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect. *See* 45 U.S.C. § 152, Eleventh (authorizing "closed shop" agreements).

Thus, all cross-overs must retain their union membership. TWA may not discriminate among union members based on the degree of their union activity. Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity.[4]

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4 The union security clause also requires that new hires obtain union membership in order to continue employment with TWA. New hires, however, were not union members when they began work during the strike. Thus, new hires cannot be the subject of discrimination based upon union loyalty and activity.

We note that many of the cross-overs attempted to resign from the Union. Assuming, without deciding, that *Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 3064 (1985), applies to cases arising under the RLA,[5] union members may resign from all obligations except that of paying dues and the Union may not fine them for working during a strike. *Id.* at 3071 & n.16. In the present case, cross-overs have apparently ceased their union memberships except for payment of dues. This action only exacerbates the division among union members along lines of union loyalty. Furthermore, if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status. Accordingly, the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity.

Our review of the law supports our conclusion that the cross-overs do not acquire the status of permanent replacements. In *NLRB v. Erie Resistor*, the Supreme Court upheld the NLRB's decision that an award of super-seniority to permanent replacements and cross-overs unlawfully discriminated against those who engaged in union activity. 373 U.S. at 231-32. Although TWA has not awarded super-seniority to the employees who worked during the strike, several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here.

The Court disapproved of super-seniority because the award operated to the detriment of strikers as compared to non-strikers; it in effect offered an inducement to abandon the strike; and it created a long-term division among the workforce. *Id.* at 231. Although an award of super-seniority brings these concerns into a sharper focus than does the conferring of permanent replacement status to cross-overs,

5 In this context, the RLA's authorization of union shop agreements may be significant. Under the RLA, union members apparently need only pay dues if they so desire. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984). Whether a union organized under the RLA may fine its members for working during a strike is an open question which we need not decide here.

these concerns are nonetheless present. Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause.

Cases that have followed *Erie Resistor* are more explicit concerning the treatment of cross-overs. In *George Banta Co. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), the court stated that the nature of the benefit conferred on cross-overs was irrelevant. *Id.* at 19. Rather, an employer may not divide the workforce into those who engaged in strike activity and those who did not. *Id.*

The Seventh Circuit has held that an employee who abandons the strike and returns to his pre-strike position is not a permanent replacement. *International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972). The district court, however, felt that *J. L. Clark* was probably not good law in light of *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982). We do not agree. *Giddings* held that during a layoff, permanent replacements and reinstated strikers have a right of recall on the basis of seniority over unreinstated strikers. *Id.* at 930. Thus, *Giddings* in no way casts doubt on the rule that cross-overs returning to their old positions are not permanent replacements. Furthermore, the Seventh Circuit has recently approved reliance on *J. L. Clark*. *See Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *aff'g*, 614 F. Supp. 1020, 1046 (N.D. Ill. 1985), *cert. denied*, 107 S. Ct. 1605 (1987).

Randall, *supra*, relied on by the district court, does not control the decision in this case. The district court determined that *Randall* implicitly approved the grant of permanency to cross-over employees. At issue in *Randall*, however, was the definition of vacancy, and the court merely upheld the NLRB's decision that the employer's practice of offering "special-rated" jobs to employees already working rather than unreinstated strikers unlawfully discriminated on the basis of union activity because Randall was offering an "additional preference besides permanence." *Id.* at 1246. The status of cross-

over employees as permanent replacements was not an issue in that case. Furthermore, *Randall* arose under the NLRA and the parties were not bound by a closed shop agreement. Thus, we deem *Randall* inapplicable to the present case.

Accordingly, we hold that unreinstated strikers are entitled to displace cross-over employees with lesser seniority.

C. *Trainees*

The district court held that the 463 trainees who had not completed their training at the time the strike ended did not become permanent replacements and thus were subject to displacement by returning strikers. The court primarily relied on *H. F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972). In writing for the *Binch* court, Judge Friendly stated that although a permanent replacement need not actually appear on the job in order to displace a striking employee, the replacement must report within a reasonable period of time. *Id.* at 362. The district court here decided that two days constituted a reasonable time, that is, those trainees who did not complete their operating experience flights within two days of the Union's unconditional offer to return to work could not be considered permanent replacements.

TWA argues that the district court's "2-day rule" is totally without foundation in the law. It contends that trainees need not be fully qualified or actually working in order to be deemed a permanent replacement, relying on *Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part & rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), and several cases arising under the National Labor Relations Act (NLRA). TWA thus asserts that all persons in training at the time of the Union's offer to return to work on May 17 were permanent replacements and not subject to displacement by returning strikers.

In our view, the Seventh Circuit's decision in *Air Line Pilots Ass'n (ALPA) v. United Air Lines, supra*, is dispositive of this issue. We observe that the district court did not have the benefit of the Seventh Circuit's *ALPA* opinion because it was

published after the district court's decision in this case. On appeal, however, the Seventh Circuit reversed the district court and rejected the rationale upon which TWA relies.

In *ALPA*, the airline hired some 500 pilots to work on the first day of the strike, but the employer required these pilots to undergo training before assuming flight duties.[6] The pilots refused to cross picket lines and United refused to consider them employees, thus making their employment contingent upon crossing the picket lines. The district court had determined that the trainees were entitled to employee status as of the first day of the strike in accordance with the offer by United and acceptance by the student pilots. 614 F. Supp. at 1042. Accordingly, the district court held that these trainee-pilots were protected by the RLA and the airline had unlawfully conditioned their employment on crossing a picket line. *Id.*

On appeal, the Seventh Circuit reversed the district court's determination that the pilot trainees qualified as employees. The Seventh Circuit ruled that an employee as defined by the RLA must be someone who has actually "*performed services for the employer under that employer's supervision.*" 802 F.2d at 913 (emphasis added). The court based its conclusion on the plain and specific language of the RLA, which provides RLA coverage to " 'every air pilot or other person *who performs any work as an employee* or subordinate official of such carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*' " *Id.* at 911 (quoting 45 U.S.C. § 181) (emphasis by the court). Accordingly, the trainees did not receive employee status and the protections of the RLA.

We follow the Seventh Circuit's ruling in *ALPA*.[7] The trainees in question, although hired by TWA, never performed

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6 The pilot trainees in question were already trained pilots at the time of their "employment" with United. The training course familiarized them with United's planes and practices.

7 We note that the positions taken in *ALPA* differ from the present case, that is, the union in *ALPA* argues that the trainees were employees

any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA.

We acknowledge that the circumstances surrounding the pilot trainees in *ALPA* differ from the situation here. Specifically, United expressly told the pilot trainees that they were not employees and they did not receive a salary pursuant to a signed agreement with United. In the present case, the opposite occurred: TWA told the trainees that they were employees and they received a salary.

These differences, however, are irrelevant under the RLA. The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under supervision of the employer. This performance factor is determinative in trainee situations because it is the only requirement that the statute explicitly includes. Thus, clear statutory language supports the conclusion that the trainess are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

This conclusion is further supported by the consequences resulting from the valid closed shop agreement that remains in effect between the parties in this case. The contract provides that union membership is a condition of continued employment with TWA. Thus, if the trainees were to be considered as employees, they would need to join the Union and pay dues. Furthermore, the training school would become a subject open to collective bargaining. None of these consequences occurred or have even been contemplated by the parties. In addition, our previous decision in *TWA* addressed the continuing obligation of Union members to pay dues. This court did not require trainees to pay dues.

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whereas here, the Union argues that the trainees were not employees. The rule applies regardless of which party contends that trainees, not on the job, qualify as employees. The Seventh Circuit's holding is based on an interpretation of statutory language and binds all parties.

Additionally, the history of TWA's training program is instructive. Prior to the strike, trainees were not considered TWA employees by anyone. Only when the strike began did TWA attempt to accord the trainees employee status. TWA's attempt failed because these trainees did not perform services before the strike ended. To conclude otherwise would allow an employer to amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended. Such a result is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

Finally, cases decided under the NRLA also support the rationale that the trainees should not be considered employees. Under the NLRA, employees remain employed and are protected from discharge while they are on strike. 29 U.S.C. § 152(3). *Mackay Radio*, *supra*, recognized an exception to the statute's general rule by holding that an employer may hire replacements for strikers and need not fire the replacements once the strike has ended. 304 U.S. at 345-46. *Mackay Radio* is recognized as an exception to the general rule. *Giddings*, 675 F.2d at 926 (quoting *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980)). Courts have been reluctant to extend the *Mackay Radio* exception. *See, e.g., Erie Resistor*, 373 U.S. at 232; *J. L. Clark*, 471 F.2d at 698.

Whether the trainees can be considered permanent replacements within the *Mackay Radio* exception depends upon the rationale used in *Mackay Radio*. In that case, the Court employed a balancing test that weighed the negative impact of hiring permanent replacements on union activity against the business justification for doing so.

Applying this balancing test to the trainees, the trainees do not obtain the status of permanent replacements. During the strike, TWA's interest in continuing its service required the replacement of strikers. The training of new people to fill strikers' positions was appropriate in fulfilling TWA's interest. People who completed their training during the strike and went to work clearly fit within the *Mackay* exception. They filled positions left open by strikers and permitted TWA to operate more efficiently. Thus the balance tips in favor of TWA.

The balance, however, is different for the trainees who had not completed their training when the strike ended. The strike ended when the Union unconditionally offered to return to work. Thus, TWA could operate with returning strikers. It established no business need to put trainees into working positions because all vacant positions could be filled with returning strikers. Thus, while TWA shows no business justification for employing 463 trainees ahead of regular employees who have ended the strike, TWA's utilization of trainees to prevent Union members from returning to their jobs causes great damage to the Union.

Accordingly, even applying the rationale of NLRA decisions, unreinstated strikers are entitled to those positions now held by the 463 trainees.

Although we do not adopt the district court's two-day rule, the status of the trainees remains the same under our reasoning as under the district court's two-day ruling. No trainee completed his or her training between the end of the strike, May 17, and May 20. The district court's two-day rule is more generous than what we have determined the RLA to allow but the Union has not objected to the district court's ruling. Thus, we conclude that any trainee who had not yet performed services for TWA under its supervision by May 17 is not a permanent replacement.[8]

III. Conclusion

For the reasons stated above, we affirm the district court's order granting employment preference to the new hires and denying such preference to the trainees. We reverse the district court as to the cross-overs. We remand this case and direct the district court to modify its judgment consistent with this opinion. TWA is directed to pay one-half the Union's costs in

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8 After oral argument in this case, TWA filed a Rule 60(b)(3) motion seeking relief from the district court's decision concerning the trainees. TWA contends that the district court relied on facts that were misrepresented to the court.

The district court denied TWA's motion on February 17, 1987, and directed that the motion be forwarded to this court. Today's opinion moots the issue pressed by TWA and we express no further comment on its motion.

pursuing its cross-appeal as well as one-half of the Union's costs incurred in defending TWA's appeal.

A true copy.

Attest:

Clerk, U. S. Court Of Appeals,
Eighth Circuit.

APPENDIX B

Order of the U.S. Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-2197/2319WM

The Independent Federation of Flight Attendants, etc.,
Appellee/Cross-Appellant,

vs.

Trans World Airlines, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court for the Western District of Missouri.

Appellant/Cross-Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges John R. Gibson, Fagg and Bowman would have granted the petitions. Judges Ross and Magill did not participate.

Petition for rehearing by the panel is also denied.

August 31, 1987

Order Entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

Order of the U.S. Court of Appeals for the Eighth Circuit Granting Stay of Mandate Pending Certiorari Proceedings

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-2197/2319WM

The Independent Federation of Flight Attendants, etc.,
Appellee/Cross-Appellant,

vs.

Trans World Airlines, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court for the Western District of Missouri.

The motion of appellant/cross-appellee for stay of mandate is granted, and the mandate of this Court is hereby stayed to and including October 8, 1987. If during that period there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that appellant/cross-appellee has filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition by the Supreme Court.

September 24, 1987

Judge Bright:

Order entered pursuant to your recent directions.

Linda L. Penberthy:eh

cc: Judge Lay
Judge Wollman

APPENDIX D

Memorandum and Order of the U.S. District Court for the Western District of Missouri

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff (IFFA), a union representing airline flight attendants employed by defendant (TWA), seeks partial summary judgment ruling the three major controversies presented in Count I of the first amended complaint. TWA has filed a motion seeking partial summary judgment in its favor on the same issues. The motions were argued August 25, 1986, and supplemental affidavits were received by leave of court thereafter.

This is a declaratory judgment action, with a prayer for incidental relief, relating to TWA's failure to reinstate striking flight attendants at the conclusion of a strike, in May 1986. In related litigation IFFA seeks a ruling that the strike was induced by unfair labor practices, in violation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151, et seq. In the alternative,

in this litigation the parties assume the court will conclude after a trial in the companion case that there was a strike over economic issues, beginning March 7, 1986. IFFA asserts that its members, as economic strikers, are entitled to reinstatement over three classes of current flight attendant employees of TWA: (1) some 1220 "new hires," employed in the first few days of the strike, who IFFA contends were permanent additions to the workforce rather than permanent replacements for strikers; (2) "junior crossovers," that is, persons who either worked throughout the strike or returned to work as flight attendants prior to 10:00 p.m. on May 17, 1986, when IFFA's president tendered an offer to return to work (the number who would be displaced would be no more than 1284 crossovers, excluding those crossovers who may have seniority over full-term strikers); and (3) some 463 "trainees" who had begun flight attendant training but had not completed such training on May 17, 1986.

TWA has reinstated fewer than 200 full-term strikers. TWA contends that all of the above categories of workers are entitled to remain on their jobs if, as TWA contends, the strike in question was simply an economic strike. TWA further contends that IFFA did not make an unconditional offer to return to work, as is required before a duty to reemploy strikers occurs.

All parties seek prompt resolution of these questions and have been cooperative in stipulating to pertinent facts and in supplementing such agreed facts with affidavits rather than engaging in contentious discovery. The court relies on a major stipulation filed July 21, 1986, and has received supplemental affidavits from affiants Frankovich (August 22), Peltzman and Laursen (August 25), Hoar (August 29), Chimenti (September 8), as well as large collections of affidavits filed by TWA on August 12 and by IFFA on September 2 and 3. I conclude that there are no controversies regarding pertinent facts that would preclude summary judgment. Facts necessary to ruling will be recited in connection with the analysis of the union's three basic claims and the "conditional offer" defense. That general defense will be rejected, for reasons set forth below. TWA is entitled to prevail, in my opinion, on two of the three substan-

tive controversies, and IFFA is entitled to prevail on one of them (the "trainee" issue).

I—"Unconditional Offer" To return To Work

Before an employer is required to reinstate economic strikers, and to desist from employing new hires, the parties agree the law requires that the economic strikers must make an unconditional offer to return to work. IFFA contends this occurred at 10:00 p.m. on May 17, 1986, when its president, Frankovich, delivered to a TWA official, Hoar, a written statement offering on behalf of the strikers to abandon the strike and return to work. TWA contends there were certain qualifications and conditions unresolved. In any event, TWA began implementing a reinstatement plan, pursuant to Hoar's letter to Frankovich on May 23, 1986. TWA asserts there was a reservation of rights in Hoar's letter.

On its face, the May 17 letter (Stip. Exh. 5) is an unconditional offer, though coupled with an assertion that the IFFA strikers have a right to reinstatement as unfair labor practice strikers. Hoar correctly describes it as an offer "on behalf of all the strikers, to return to work immediately." Hoar Aff. August 29, 1986. At various times during the next few days, TWA raised questions about (1) whether IFFA was demanding return in seniority order, (2) whether IFFA might resume striking if its members rejected TWA's latest settlement proposal, and (3) whether picketing and in particular notices that a strike was in progress were inconsistent with the offer to return.

On Sunday, May 18, Frankovich delivered a "clarifying" letter (Stip. Exh. 6) offering to return the employees in seniority order and asserting a legal duty to reinstate employees in that order but stating, "Lest there be any misunderstanding, IFFA's unconditional offer is made independent of and irrespective of the outcome of the membership ratification vote on TWA's latest proposal. Moreover, employees will return to work as directed by the Company." It was further asserted that

TWA acts "at its peril" legally if reinstatements were made out of seniority order. While TWA asserts this letter is ambiguous, I believe it reaffirms the unambiguous offer of May 17 and is itself fully consistent with an unconditional offer to return to work.

Frankovich further recites, in an uncontested portion of her affidavit (Frankovich Aff. August 22, 1986), that she gave immediate instructions on May 17 to stop picketing with strike notices. She did not agree to refrain from informational activities publicizing the continuing dispute with TWA. All this seems legally proper, and the fact that some strike notices were displayed in New York prior to TWA's consent to reinstate strikers was apparently inadvertent and not inconsistent with an unconditional offer to return to work. At that point the unreinstated workers were in fact "on strike" involuntarily.

The Hoar letter of May 23 (attached to Hoar Aff. August 29, 1986) continues to protest the alleged lack of an unconditional offer to return to work, and may thus be said to contain a reservation of rights, as TWA contends. As stated above, however, I conclude the offer to return was unconditional, and created a duty to reinstate economic strikers in vacancies as they develop in the flight attendant workforce.[1]

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1 The letter has some significance, however, in appraising the respective rights of striking flight attendants and trainees who had been given the title but not the work of a flight attendant prior to the end of the strike. Hoar states he is freezing "our active permanent Flight Attendant work force" and that strikers will be placed on a preferential rehire list "from which they shall be rehired for active service if immediately available for such service to fill vacancies in order of seniority . . ." This wording distinguishes between active service flight attendants and other employees (such as strikers and trainees) who bear that title. It seems to be a commitment not to place trainees in "active service" vacancies after May 23. It appears, however, that trainees were placed as "active flight attendants" ahead of strikers, "beginning the last week of May." Stip. ¶ 24. To the extent that TWA had previously promised trainees they would not be required to yield to strikers, TWA seems to have given two conflicting commitments.

II—CROSSOVERS

At the conclusion of argument of the summary judgment motions I stated from the bench a conclusion that "junior crossovers" are entitled to retain their positions at the end of an economic strike, and cannot be displaced by the exercise of "bumping" rights of full-terms strikers who may enjoy seniority.

The contract between IFFA and TWA, which I have ruled (in other litigation) still exists, does not authorize the exercise of seniority rights to obtain reinstatement after a strike. It does authorize use of seniority to obtain reinstatement after layoffs, but that is a different situation. IFFA argues, however, that labor law principles establish a right to reinstatement, except as to new hires employed during the strike as permanent replacements for strikers.

It is not necessary to recite the law generally applicable to the right to reinstatement following an economic strike. A brief overview of the development of the applicable law, under the National Labor Relations Act, appears in the Eighth Circuit opinion of Judge Arnold in *Randall, Division of Textron, Inc. v. NLRB*, 687 F.2d 1240, 1244 (8th Cir. 1982), (cert. den. 461 U.S. 914 (1983)). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court struck down an employer's plan to grant twenty years' "superseniority" to persons permanently employed during a strike, but stated that "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. at 232. This language from *Erie Resistor* would protect crossovers as well as new hires from being displaced after a strike.

The *Randall* case contains a similar broad statement of the general rule. Although holding that Randall had violated the law by giving a form of "superseniority," the court's criticism was that Randall had given "additional preference besides permanence to those who remained at work as opposed to those who struck . . ." 687 F.2d at 1246. It is quite clear that the Eighth Circuit had no criticism of simply giving "permanence" to those who remained at work. It is equally clear that the court knew it was dealing with a situation involving crossovers as well as new hires.

In the *Randall* case, as recited by the Court of Appeals, one production worker remained with the employer throughout the strike and a "steady stream of individual strikers" signed up for work during the strike. Crossovers were then accepted back on the job in preference to hiring permanent replacements. Although six unfair labor practice charges were sustained by the Administrative Law Judge, there was no finding of unlawful discrimination in the retention of crossovers over full-term strikers who may have had seniority. Such favored treatment may not even have been challenged. When Judge Arnold implied that "permanence" of tenure alone would not be objectionable, if no additional preference were given to "those who remained at work," the Eighth Circuit thereby gave implicit sanction to the conduct of which IFFA now complains.

IFFA relies on two cases from other circuits, however, and in addition contends that the Railway Labor Act should be interpreted to give greater protection for strikers than is conferred by the National Labor Relations Act.

IFFA cites *George Banta Co., Inc. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982). It is not clear that *Banta* dealt with unreinstated strikers, at least when the case reached the court of appeals. Even if some of the remarks of the court may be favorable to the IFFA contention, no reason was suggested for differentiating between new hires and crossovers. The right to retain permanent new hires was said to be "one significant exception" to the right of reinstatement of economic strikers (686 F.2d at 20) but the court did not explain, and perhaps had no occasion to explain, why the protection of new hires should not apply equally to crossovers who may lack seniority.

The other case principally relied on by IFFA is *IAM v. J.L. Clark Company*, 471 F.2d 694 (7th Cir. 1972). In that case two judges on the panel held that a crossover who lacks seniority may be "bumped" by a returning striker having greater seniority, if the crossover has not changed his work during the strike and replaced the striker in his old job. No authority or reason

for such right of reinstatement was given, other than that Supreme Court decisions have only given protection to permanent replacements. The dissent, by Judge Pell, observed that Supreme Court decisions give "no indication that the strikers who returned to work during the strike were any less protected than the new employees . . ." 471 F.2d at 700. Judge Pell saw no reason to give special preference to new hires, as against crossovers, and no reason has been suggested by IFFA in this case or is developed in any of the other authorities reviewed by the court.

It would seem that employers faced with a strike would have at least as great a practical need for employing crossovers as new hires, if crossovers can be induced to return to work. The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark decision of *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back.[2] It is surely as difficult psychologically for old employees to abandon their coworkers and cross a picket line as it is for new hires to take such action. If *Mackay Radio* is sound (and I recognize that some academic critics advocate disabling employers from hiring permanent replacements for strikers) the same principles would seem to apply to protect crossovers.

TWA cites one decision in the Sixth Circuit that indicates that strikers have no right to "bump" crossovers, if post-strike

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2 IFFA's briefing tacitly concedes that TWA made a commitment to its crossovers that they could retain their jobs after the strike. One specific "guarantee" against replacement was made on March 17, 1986. Exh. 22 to Borden affidavit filed August 12, 1986. Even as to crossovers employed during the first ten days of the strike, this commitment seems effective as a guarantee of "permanence." Cf. *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978) (belated decision to offer permanence not effective where not communicated). At least one prestrike communication seems to promise prospective crossovers that they will not be replaced by strikers. Exh. 13 to Borden Aff. of August 12, 1986.

work of the employer is insufficient to keep all employed. *NLRB v. Harrison Ready Mix Concrete*, 770 F.2d 78 (6th Cir. 1985). Additional cases from the Seventh Circuit, such as *Giddings & Lewis v. NLRB*, 675 F.2d 926 (7th Cir. 1982), make questionable whether *J.L. Clark* would still be followed by that court.

The language of the courts in *Erie Resistor* and *Randall* is broadly protective of the rights of all persons who work during a strike. The breadth of that language seems fully justified in principle and will be followed in this decision.

IFFA's final argument for its contention that strikers should have the right to displace crossovers is that the court should disregard the NLRA precedents in favor of the allegedly greater protection given employees under the Railway Labor Act. This contention, which was emphasized at oral argument, is wholly lacking in support in the cases. On the contrary, the Second Circuit has recently noted that the Railway Labor Act explicitly protects only "organizing and representational rights, as opposed to the broader 'concerted activity' rights under the Wagner Act." *IUFA v. Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986). The only suggestion that employees may have greater rights under the Railway Labor Act is contained in rulings where express restrictions in the NLRA do not appear in the RLA. *E.g.*, *BRT v. Jacksonville Term. Co.*, 394 U.S. 369 (1971). In the present context it seems desirable to draw on NLRA experience rather than to create novel principles applicable only in the Railway Labor Act context. A few courts have so ruled, when considering reinstatement rights of airline strikers. *National Airlines, Inc. v. IAM*, 416 F.2d 998, 1006 (5th Cir. 1969); *ALPA v. United Airlines*, 614 F.Supp. 1020 (N.D.Ill. 1985).

On the assumption that the IFFA strike that began March 7 was an economic strike, it is therefore concluded that none of the 1284 crossovers are subject to being displaced by more senior unreinstated strikers.

III—New Hires

Treating the new hires who came to work on and after March 7, 1986, as permanent flight attendants, IFFA nonetheless contends that their employment cannot block the return of full-term strikers to the payroll because it characterizes the new hires as permanent *additions* to the workforce rather than as replacements for strikers. IFFA relies on a pre-strike notice by TWA to prospective flight attendants (Stip. Exh. 9) that promised them employment if they came to the TWA premises on March 7 to receive a formal offer of employment, regardless of whether there was a strike on that date.[3]

TWA explains by affidavit (Borden Aff. August 12, 1986) that its planners anticipated a need for the new flight attendants in any event. If there were a strike, TWA would need replacements for strikers. If there were no strike, TWA expected that large numbers of its flight attendants would promptly elect to take early retirement on favorable terms that would be appealing to those who chose not to remain at work at reduced salaries. TWA contends that the occurrence of the strike on March 7 eliminated the special early retirement offer and the prospect that flight attendants might need to fill the jobs of retirees. Thus, TWA asserts, the alternative of being strike replacements was the eventuality that was ultimately realized.

TWA's factual contention seems the only realistic, practical way of looking at what occurred. The new hires went through picket lines to receive the formal offers of employment. Affidavits have been filed by the TWA personnel charged with processing new hires stating that groups of new hires were lectured about their role as strike replacements on March 7 and the next few days, when the persons in question assumed their positions. While it is not established by affidavit that the term "strike replacements" was regularly or frequently used in

3 IFFA's initial briefing contends that the notice itself is dispositive of the entire issue. It is difficult to understand that contention because the notice expressly referred to the possibility that the new hires might be needed for strike duty.

describing the function of the new hires, it can hardly have escaped their attention that a strike was in progress, that TWA's flight attendants were for the most part on strike, and that they as newly hired flight attendants were replacing the strikers.

IFFA responds with affidavits from a number of former employees hired on March 7 and the subsequent days denying that the term "strike replacements" was used in explaining their role. They uniformly deny they understood they were being asked to serve as strike replacements. Some of the affidavits state, however, that the affiants were told they would be required to cross picket lines if they wanted to retain their jobs and that jobs would be immediately available if there were a strike, but work would not be immediately available otherwise. Taylor Aff. of September 3, Martoia Aff. of September 2, Speere and Alexander drafts of affidavits of September 2 (usable as admissions by IFFA). IFFA contends that mere subjective theories of an employer do not create a status, citing a case where temporary employees were not treated as permanent replacements in the absence of evidence that the employer's description of their status was expressed to the employees. *NLRB v. Murray Products, Inc.*, *supra*. While the case so holds, in considering the issue of "permanence," a matter of contract, I doubt that mutual understanding or formal notice is required on the issue of whether an employee is a strike replacement. That may be treated as a matter of fact, depending on how the employee was actually used.

It remains clear, however, even considering the IFFA affidavits, that under the circumstances of a strike the new hires had been at least twice advised in writing that they would be strike replacements if employed as new hires after a strike began. Mr. Borden's written statements to that effect, dated November 22, 1985, and February 10, 1986, were distributed to Travel College graduates and students. Borden Aff. ¶¶ 32, 40, referring to Borden Exhibits 8 and 11 (filed August 12, 1986). The only reasonable understanding beginning March 7 was that the new hires were being employed for permanent jobs, with initial service that may be legalistically referred to as "strike replace-

ment" or more commonly termed strikebreaking. This is doubtless the way IFFA described the work at the time, and the description seems accurate. In the derogatory term of the labor movement, the new hires were "scabs."[4]

It is not necessary for this decision to weigh the credibility of some of the affidavits, particularly the denial that the affiants "understood" they were being offered work as strike replacements. I believe the term as used in *Mackay Radio* is indistinguishable from strikebreaking, and the facts here speak for themselves. It is possible, however, it was used in the affidavits in a post-strike sense; that is, that the affiants may have thought the new hires could continue working (as promised) and that the returning strikers would *also* have jobs. In that sense, the affiants may have been stating that they did not believe they were being employed to permanently replace strikers but would become additions to the workforce. This may have been somewhat unrealistic, but it may fairly be treated as a credible assertion of subjective belief and I so construe it.

Nothing in *Mackay Radio* requires, however, that strikebreakers who have been offered permanent jobs be told that the employer anticipates the permanent displacement of the economic strikers. Such displacement is permissible under that decision depending on economic needs of the employer after the strike.

The only case purportedly contrary to this view is *Murray Products*, *supra*, where one employee was referred to as an addition to the workforce whose employment could not be used as a bar to reinstating a returning striker. While the Ninth Circuit may have been a bit generous in ruling that case involving the status of a single employee, it was simply accept-

4 It seems immaterial for present purposes that TWA may have somewhat overemphasized the prospects for employment without a strike or that some officials may have denied that it was simply operating a school for "scabs." The alternative of using the pre-strike trainees as strike replacements was expressed in writing, distributed to the trainees by TWA. Borden Aff. ¶¶ 32, 40.

ing a finding that a new hire was told unconditionally that he was taking a "new position." That did not happen here. I do not believe *Mackay Radio* would permit a ruling that large numbers of strikers must be reinstated, regardless of TWA's economic needs, simply because some of those who replaced them during the strike and were promised permanent jobs had a confused notion that there would be room for everyone after the strike.[5]

For the foregoing reasons, I conclude that the new hires employed on and shortly after March 7, 1986, cannot be displaced by returning economic strikers. Moreover, such persons should not be categorized as additions to the flight attendant workforce whose employment would not block the return of economic strikers. The new hires during the strike were employed as strikebreakers, sometimes called permanent replacements, and had been so notified.

IV—TRAINEES

TWA contends that 463 persons who were still trainees on the date the strike ended may be treated as permanent replacements as flight attendants because they were on TWA's payroll as flight attendants from the time of entry in training school, and were paid as flight attendants. It cites cases holding that persons in training are not precluded from being considered replacements for fully trained strikers. Other authorities hold that promises of employment may be honored after a strike, at least when the belated arrival of the employee on the job occurs within a reasonable time after the strike ends. At the

5 If the law were to the contrary, it would apparently be necessary to try the individual situations and understandings of more than 1000 current employees (none of whom has filed an affidavit) to ascertain whether they thought they were permanently displacing strikers or would be treated as additions to the workforce after the strike. Given the delay and uncertainty posed by such an issue, the parties may be fortunate that I do not believe *Mackay Radio* requires anything other than the offering of permanent positions to new hires being used as strikebreakers.

beginning of the strike, however, presumably with legal counsel, TWA informed an earlier group of trainees that the law provided them with assurance of permanent jobs "if you're hired and working as a Flight Attendant." Stip. Exh. 12. TWA statements on March 28 and April 15 likewise offered permanent status to "working flight attendants." Exhibits 24 and 25 to Borden Affidavit of August 12, 1986.

A decision which is most helpful to the ruling of this issue is Judge Friendly's opinion in *H. F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972). In that case the question was whether replacements had occurred before the end of a strike at 2:00 p.m. on March 16, 1968. On that day the mother of one replacement purported to accept the employer's job offer for him, and the employer made a record entry of employment, but the replacement did not appear on the job for processing of application papers until three days later. Another purported replacement had indicated a desire for regular employment before the strike ended and a record entry had also been made by the employer showing that she had replaced a striker. The court ruled that strikers had not been effectively replaced in either instance. Two other employees who had transferred to strikers' jobs and were "actually at work" when the strike ended were held to have displaced strikers.

The court ruled that determination of the question of "just what circumstances constituted a hiring to fill the place of strikers . . . must be answered in a practical frame." 456 F.2d at 361. Although the court drew a protective line in that case around employees who were actually at work when the strike ended, Judge Friendly stated that "actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date." 456 F.2d at 362. If the hiring process had proceeded so far that the replacement "would have reasonable 'grounds for indignation' if he were subsequently denied the promised job" Judge Friendly was prepared to accept the replacement as effective. More than an employer's promise is required, under the Friendly test, however; there must, in addition, be an expectation that arrival on the job will occur "at a reasonably early date."

The three day delay in availability in one instance in *Binch* apparently made ruling against that purported replacement comparatively easy. Under the *Binch* decision, it would not seem that a striker must wait around for a replacement who is not essentially ready for work. While an unseemly race is not required, very prompt availability seems necessary. One can conceive of a situation where a replacement might fairly be allowed several days, if in transit to a distant job, for example. But arrival at a "reasonably early date" should not require a returning striker to stand idly by and watch a job disappear during a substantial or unjustified waiting period.

In the present case, TWA has available a series of arguments. One is that the trainees in question had been upgraded in company records to flight attendants and were being paid as flight attendants, so they should be deemed to be flight attendants for purposes of displacing strikers, regardless of their total lack of on-the-job experience. A second theory is that at least some of the trainees were ready for work within a very few days of May 17. Finally, the necessity of a training period is at least arguably consistent with the requirement of arrival at a "reasonably early date," when all the trainees were placed within a six week period.

The Peltzman affidavit, filed August 25, shows that all but five of the trainees completed their training and were placed on "operating experience" flights beginning May 20 and ending June 3. They performed flight attendants' duties, under supervision, on "revenue flights" originating in St. Louis. Placement occurred every day, including Saturdays and Sundays. There was, however, a break between the evening of May 17 (when Frankovich made IFFA's offer to return to work) and the first operating experience flight for 18 trainees on May 20. We are not informed when the trainees began their regular, unsupervised duties at an assigned domicile. But it may be sound, using NLRA precedents, to count on-the-job training as a basis for replacing strikers. The Peltzman affidavit is, therefore, usable proof.

What should be treated as a "reasonable time," however, under these circumstances? If the month of May were used to protect replacement rights, most of the trainees would prevail, but 71 would be deemed tardy. If trainees were deemed to be required to begin their operating experience flights within five days of the strikers' offer to return to work, however, 80 would prevail, but the bulk of the trainees would be considered too late. If a two-day rule were used, none of the trainees would win.

The two-day rule seems most consistent with Judge Friendly's concept in the *Binch* case. It has the additional advantage of using the only period in the record where there was an appreciable break in the process. It would appear that word of the Frankovich offer was very promptly circulated, and enabled TWA to call a halt to its operating experience flights on Sunday, May 18, and on Monday, May 19. The resumption of such flights on May 20 suggests a reconsideration by TWA, and adoption of a "hard line" favoring replacement of strikers. That apparent change in tactics may be fairly treated as untimely. If TWA was reasonably able to stop the trainees from going through their final training period, it was obligated to do so, in order that its conflicting legal duty to returning strikers could be honored.[6]

One must reject the theory that a mere job title and rate of compensation should be deemed to establish status as a flight attendant, sufficient to withstand the claims of returning strikers. A trainee who has never served as a flight attendant (even as an apprentice under supervision) should not be given priority of rights, if the questions presented are to be answered "in a practical frame," as Judge Friendly suggests.

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6 As previously discussed in footnote 1, moreover, on May 23 TWA told returning strikers that they would have prior rights to vacancies in "active service." In violation of this commitment, TWA apparently began to place trainees in active service on and after May 24, 1986. It is unlikely that *Mackay Radio* protects commitments to replacements when an employer has also made conflicting commitments to returning strikers.

Allowing TWA to continue training replacements for weeks after the strike had ended, and giving such trainees priority over returning strikers, does not seem to satisfy the *Binch* rule that on-the-job service must begin at a "reasonably early date" after commitments have been made. I must respectfully disagree with what seems to be a contrary ruling by Judge Bua, therefore, when he allowed displacement of striking pilots with new hires, after the conclusion of a pilots' strike, even though the employer necessarily deferred actual assignments of such new hires until their completion of a training program. *ALPA v. United Air Lines, Inc.*, 616 F.Supp. 849, 851 (E.D.Ill. 1985). For reasons I shall discuss further, this seems an unsound loosening of the *Binch* test, which was cited by Judge Bua as the controlling general principle.[7]

It would distinctly expand the *Mackay Radio* principle if permanent replacements were to include not only persons who begin working during the strike or immediately thereafter but also persons who are simply in training at some other site. The expansion seems unwarranted. *Mackay Radio* was designed to meet a perceived need by employers to offer permanent jobs to strike replacements; otherwise, it is presumed, it will be extremely difficult to recruit persons who will replace strikers, most typically by going through a hostile picket line set up by persons endangered by the prospective loss of a job. Merely attending a training school typically presents an easier situation. While strikers may be expected to bombard trainees with propaganda, the imminent danger of truly hostile words and conduct would not seem as likely. Therefore, unlike the *Mackay Radio* situation, a pressing need to offer permanent positions to trainees should not be presumed.

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7 The *ALPA* case is on appeal, and has been argued. The briefing suggests that for tactical purposes or otherwise the union is seeking an "all or nothing" ruling. The entire group of unreinstated pilots seeks reinstatement on the theory there was an unfair labor practice committed; little if any effort was made on appeal, and perhaps not before the district court, to replace the late trainees as a separate group.

In the present case, I am aware of contentions by TWA that there was hostility expressed by IFFA picketers at the training school and that TWA felt a business need to offer the trainees permanent jobs. Henderson Aff. August 12, 1986, ¶¶ 29, 42, 44, 56. The degree of hositility has not been shown to approach that directed toward employees on active service, however, where there were documented reports of obscene telephone calls, verbal threats of bodily harm and physical assaults. Borden Aff. ¶¶ 88, 89. Mr. Henderson seems simply to be reporting his own impressions, without offering any basis for making comparisons with what was occurring at the airports.

A TWA management official may well have sensed hostility at the picket line that was no problem for trainees. No complaints from trainees have been disclosed, and no affidavits filed. While the question may be close, I do not believe the Henderson affidavit suffices to justify an enlargement of *Mackay Radio*. A better appraisal might be made after a hearing, but it seems desirable to rule as a matter of law, rather than create factual issues that must be fully litigated in each case before management or labor will be able to know their rights in a training school context. The Henderson affidavit, moreover, is so conclusory, lacking in details and explanations, that a ruling of insufficiency of evidence as a matter of law would probably be justified at trial, given the substantial demonstration of business necessity that I believe is required. If so, summary judgment is authorized. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). The "sketchy beginning" of a contention is no bar to summary judgment. *Brown v. Trans World Airlines, Inc.*, 569 F.Supp. 247, 255 (W.D.Mo. 1983), *aff'd*. 746 F.2d 1354 (8th Cir. 1984).

The training school experience was not so onerous as to cause TWA to dispense with charging trainees $2500 for the right to participate in the training program. It would seem that the rights of economic strikers, earned as employees after years of service, should have sufficient legal status so that TWA should at least have experimented with a reduction in or relinquishment of the tuition charge before offering trainees

permanent employment rights, at the expense of the strikers. When people are willing to pay to cross a training school picket line, there can hardly be said to be an obvious business necessity to offer them guarantees of permanent jobs while they are in school.[8]

It is therefore determined, accepting the materials submitted by TWA that the 463 trainees who had engaged in no operating experience flights prior to May 20, 1986, and were apparently not assigned to working positions until at least May 24, 1986, were not properly retained as TWA flight attendants in preference to returning strikers. TWA will be required to reinstate returning strikers displaced by such trainees, with back pay.

CONCLUSION

It is therefore ORDERED that partial summary judgment be entered in favor of TWA on IFFA's claims in Count I for reinstatement of economic strikers displaced by crossovers and new hires who worked during the strike, and that partial summary judgment be entered in favor of IFFA on its claim for reinstatement of economic strikers displaced by trainees who did not have operating experience flights prior to May 20, 1986, and were not assigned to active service as regular flight attendants on revenue flights prior to May 24, 1986.

Economic strikers with enough seniority to have been reinstated if the 463 trainees had been displaced instead of given positions in active service shall be reinstated within 30 days, absent a stay pending appeal. Back pay with interest, less interim earnings, shall be promptly paid such reinstated strikers. In all other respects, IFFA's claim for injunctive relief is DENIED. SO ORDERED.

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8 The present ruling does not, of course, deal with the question of whether former trainees now serving as flight attendants may have some claims against TWA for displacing them with former strikers, under court order. Conceivably they may have rights under state law for return of their tuition fees or other remedies. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

The court retains jurisdiction to modify or enforce this order. A motion for stay of relief granted pending appeal will be considered by this court, given the closeness of the legal questions and the considerable dislocation caused by this ruling if there is a reversal.

/s/

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: Sept. 9, 1986.

APPENDIX E

Order of the U.S. District Court for the Western District of Missouri Granting Stay Pending Appeal

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
an Unincorporated Labor Organization,
Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,
Defendant.

ORDER GRANTING STAY PENDING APPEAL

On September 9, 1986, judgment was entered on cross motions for summary judgment, altering the status quo in one material respect. TWA was directed to re-employ some 400 full term strikers who had not been reinstated at the end of the strike because some 400 trainees were retained in TWA's employ and thereafter given flight attendant positions on commercial flights. The strikers to be reinstated under my ruling apparently have a minimum of some 20 years seniority as flight attendants.

In order to avoid a precipitous and disorderly change in airline personnel, the order was to be given effect within 30 days. Thereafter, in order to deal with pending motions, the effective date was advanced to the end of October 1986. TWA has appealed and now seeks a stay pending appeal.

The initial ruling noted the possibility of a stay, based on "the closeness of the legal questions and the considerable dislocation caused by this ruling if there is a reversal." Subsequent filings and further study reinforce my inclination toward granting a stay. While I recognize that in some instances dire hardship may be caused by a further delay in reinstatement, all factors to be considered make a stay appropriate.

The balancing of interests in this context is much like that involved in considering an application for a preliminary injunction. 7 *Moore's Federal Practice* (Second Ed.) 62-26. The major difference is that the party seeking a stay has lost at the trial court level. When further litigation is clearly justified, however, as where the likelihood of ultimate success remains close to 50-50, it seems fair to treat the trial court decision as simply one round in an ongoing battle, and to view the questions as involving the right to relief "pending litigation." In such a situation preservation of the status quo that existed before the immediate controversy is one of the strongest grounds for urging judicial action or inaction.[1]

In this case the 400-odd full term strikers were not in TWA's active employ but the 400-odd trainees were on the payroll when this controversy developed. That status continued without interim relief for almost four months of litigation in this court. A further delay of some six weeks is occurring while the parties ready themselves for the appeal. While appellate docket control is of course entirely a matter for the court of appeals it

1 Many opinions refer to the preservation of the staus quo as the primary function of equitable relief pending litigation. *E.g.*, *Ferry-Morse Seed Co. v. Food Corn*, 729 F.2d 589 (8th Cir. 1984); *Land-O-Nod Co. v. Bassett Furniture Ind.*, 708 F.2d 1338 (8th Cir. 1983) (dissenting opinion); *Morgan v. Fletcher*, 518 F.2d 238 (8th Cir. 1975). While exceptional circumstances may justify an order changing the status quo before judicial review has become essentially final, I believe that large-scale, disruptive changes pending litigation are seldom ordered. A trial court decision may be considered to have finality for these purposes if, unlike the case at bar, the chances of reversal on appeal are deemed minimal. The situation would be quite different, for example, if I believed the chances were two or three to one that there would be an affirmance on TWA's appeal.

may be proper to express the hope that TWA's motion to expedite will be granted, as it was in the companion case involving dues obligations, an issue that is, at least superficially, less important to the persons affected. For purposes of this ruling I will assume that a decision on appeal can be handed down quite early in 1987. If not, the issue of continuing the stay may need further consideration at the appellate level.[2]

Denying a stay would necessarily cause termination of employment of the recent trainees because they have less seniority, under my ruling, than any of the full term strikers. The comparative hardship cannot be readily assessed. Doubtless some of the former trainees were in desperate need of jobs when they were hired, and would have appealing stories to relate if affidavits were collected. It may be engaging in stereotyping to say that the former trainees as a group would be less likely to suffer hardship from unemployment than will the senior full-term strikers as a group. Even if I accepted such a stereotype, however, reinstatement of senior employees would also cause personal and family dislocations throughout the flight attendant body employed by TWA. That would somewhat even the scales. More disheartening would be the prospect of double dislocation caused by a reinstatement in November, and a possible reversal in January or February, for example.[3]

The chances for reversal must be candidly considered. Developments since September 9 have somewhat reduced my concern that the court of appeals might decide that summary judgment (one way or the other) was premature. The post-decision affidavits by TWA relate to events in late April. They could not have been the basis for TWA's decision, apparently in

2 An alternative might be to require, as a condition of stay, subsistence level payments for unemployed senior flight attendants lacking such income. I am aware of no authority, however, authorizing such a solution.

3 Some of the displaced senior flight attendants probably now have comparable or nearly-comparable jobs. Such persons would doubtless favor a stay rather than be forced at this point to elect between the jobs they have and a return to TWA that may be ephemeral.

late March, to give unqualified promises to trainees that they would not be displaced at the end of the strike even if they had not completed training. Tensions at the training center had not reached the level in March where TWA was swayed by facts rather than legal and economic assumptions when it offered permanent jobs to the trainees.[4]

It therefore seems that the appeal will likely turn on whether the appellate court agrees with me that there should be a "training school exception" to the *Mackay Radio* rule allowing the hiring of permanent replacements for economic strikers.

I continue to believe that *Mackay Radio* should be confined to its own essential fact situation, an appraisal of what is reasonably needed to induce prospective strike replacements to go through a hostile picket line to perform the tasks of the strikers. In confining *Mackay Radio* to the situs of the "combat duty" I have nothing to offer as precedent other than my understanding of the Supreme Court's rationale in *Mackay Radio*. In the only case either party has cited as having direct bearing on the "training school exception," Judge Bua assumed there was no such exception. The issue to be ruled is thus close and lacking in precedent.

Where a trial court ruling would require important changes in the status quo and the issues are novel or close, stays seem to be granted with little further analysis. *E.g.*, *In re Bradley*, 456 F.2d 6 (4th Cir. 1972) (school district merger order in segregation case); *Henderson v. State of Oregon*, 405 F. Supp. 1271, 1277 (D.Or. 1975) (adoption of "unisex" life expectancy tables by public officials should not be required "until and unless this decision is upheld on appeal"); *Davis v. Reagan*, 485 F. Supp. 1255 (S.D.Iowa 1980) (60-day stay in welfare program case).

Efforts have been made to formulate standards for granting stays on appeal. While sometimes helpful to analysis, I suspect that the ultimate rule must be as broadly stated as it was in

4 As noted in my prior decision denying reconsideration of the September 9 ruling, the events in April might or might not have occurred in the absence of an offer of permanent jobs to trainees. It would be speculative to treat those later events as justifying the prior decision to offer permanent jobs to trainees.

Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 844-5 (D.C.Cir. 1977), where it was said that trial courts "may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status should be maintained."

I reemphasize that it is the status quo when this controversy began that is probably the decisive factor here. A stay will therefore issue.

The bond to be posted by TWA should reflect ongoing wage obligations of about $1 million per month. Assuming an appellate decision early next year, an $8 million bond will be required. It is therefore ORDERED that TWA's obligation under the September 9 ruling to offer reinstatement and back pay to certain senior flight attendants is stayed pending appeal, subject to TWA's filing with the court an $8 million bond, approved by the court, within ten (10) days of this order.

/s/

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1986.

APPENDIX F

Text of Statutes Involved

RAILWAY LABOR ACT

45 U.S.C. § 151. *Definitions; short title*

When used in this chapter and for the purposes of this chapter—

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

§ 152. *General duties*

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have their right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in

this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly

required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

* * *

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 181. *Application of subchapter I to carriers by air*

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182. *Duties, penalties, benefits, and privileges of subchapter I applicable*

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 152. *Definitions*

When used in this subchapter—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

APPENDIX G

IFFA's Corrected First Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization, 630 Third Avenue, New York, New York 10017,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., Kansas City International Airport, Kansas City, Missouri,

Defendant.

FIRST AMENDED COMPLAINT

Comes now Plaintiff, the Independent Federation of Flight Attendants (hereinafter "IFFA") and for its complaint against Defendant, Trans World Airlines, Inc. (hereinafter "TWA"), states the following:

COUNT ONE

1. This action arises under and this Court's jurisdiction is invoked pursuant to the Railway Labor Act as amended (hereinafter "RLA"), 45 U.S.C. §151, *et seq.*, and 28 U.S.C. §1331 and 28 U.S.C. §1337. This Court has jurisdiction under 28 U.S.C. §2201 to grant the declaratory relief requested.

2. Venue properly lies in this judicial district pursuant to 28 U.S.C. §1391.

3. Plaintiff IFFA is a voluntary unincorporated labor organization with its principal office and headquarters located at 630 Third Avenue, New York, New York. Since April 1, 1977, IFFA has been and is certified by the National Mediation Board (hereinafter "NMB") as the duly designated and authorized exclusive bargaining representative under the RLA of all TWA employees in the flight attendant craft or class, including flight attendants in this judicial district.

4. Plaintiff IFFA is a "representative" within the meaning of the RLA and is subject to its provisions.

5. Defendant TWA is a corporation duly organized and existing under the laws of the State of Delaware and is engaged in the common carriage by air in interstate and foreign commerce of persons, property and mail. TWA maintains offices, an overhaul base, and a training center in this judicial district, and operates flights to and from the Kansas City International Airport which is located within this judicial district.

6. Defendant TWA is a "common carrier by air", within the meaning of Title II of the RLA, and accordingly a "carrier" within the meaning of Title I of the RLA, and is subject to the provisions of the RLA.

7. On April 12, 1983, TWA and IFFA signed an Agreement (hereinafter "the 1983 Agreement"), establishing the rates of pay, rules and working conditions of the flight attendants in the service of TWA.

8. Under Article 1 of the 1983 Agreement, all TWA flights which require flight attendants on board the aircraft must be operated in accordance with the provisions of the Agreement, and all flight attendants employed by TWA are subject to the provisions of the Agreement.

9. Under Article 2 of the 1983 Agreement TWA flight attendants are classified into three categories, cabin attendants, flight pursers, and service managers. Each of those flight attendant categories is defined in Article 2 of the Agreement.

10. Article 28 of the 1983 Agreement provides, with respect to the duration of said agreement:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 and shall remain in effect until July 31, 1984 and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least ninety days prior to the renewal date each year.

11. By letter dated February 29, 1984, and pursuant to Section 6 of the RLA, 45 U.S.C. §156, and Article 28 of the 1983 Agreement, TWA served upon IFFA notice of intended changes in the Agreement and TWA's proposals relating to such changes.

12. By letter dated April 27, 1984, and pursuant to Section 6 of the RLA and Article 28 of the 1983 Agreement, IFFA served upon TWA notice of intended changes in the Agreement and IFFA's proposals relating to such changes.

13. Between March 29, 1984 and March 6, 1986, IFFA and TWA representatives met in conference on numerous occasions to discuss said proposed changes in the Agreement.

14. On or about May 13, 1984, TWA invoked the services of the NMB to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

15. No agreement had been reached in the TWA-IFFA negotiations by February 4, 1986 and on that date, in accordance with RLA Section 5 first, the NMB notified TWA and IFFA

that the 30-day "cooling off" period mandated by RLA Section 5 First had begun.

16. Pursuant to that notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

17. On March 5, 1986, IFFA commenced an action in the United States District Court for the Western District of Missouri, Civil Action No. 86-6030-CV-SJ-6, alleging, *inter alia*, that TWA had violated the RLA by failing to exert every reasonable effort to reach agreement and seeking a temporary restraining order to enjoin TWA from unilaterally implementing any proposed changes in flight attendant rates of pay, rules or working conditions or taking any other action that would alter the then existing status quo. IFFA's request for a temporary restraining order was denied on March 5, 1986.

18. The parties were unable to agree upon acceptable changes to the agreement by midnight, March 6, 1986. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986. Also, TWA announced its intention to unilaterally implement many of its previously proposed changes in flight attendant rates of pay, rules and working conditions.

19. On March 18, 1986, IFFA filed an amended complaint in Civil Action No. 86-6030-CV-SJ-6 alleging, *inter alia*, that IFFA's strike was caused in whole or in part by unlawful actions of TWA and requesting *inter alia* that the court issue a declaratory judgment that IFFA's strike was an unfair labor practice strike and that all employees engaged therein were unfair labor practice strikers and as such are entitled to reinstatement to their jobs upon an unconditional offer to return to work, notwithstanding that "permanent replacements" have been hired.

20. IFFA still contends that its strike was an unfair labor practice strike and that its striking members are entitled to reinstatement to their jobs as unfair labor practice strikers upon an unconditional offer for the strikers to return to work.

21. IFFA's strike continued until May 17, 1986 when IFFA made an unconditional offer to TWA on behalf of all striking flight attendants to return to work.

22. On information supplied by TWA, at various times in the weeks and days preceding March 7, 1986, TWA offered to hire in excess of 1,274 individuals as flight attendants commencing their employment on or about March 7, 1986. Said offers stated that if said individuals would take certain steps, including notification to TWA that they were able to commence working on March 7, 1986 and reporting in person when notified to so, "you will become an employee of TWA on that day regardless of whether or not a work stoppage occurs and subject to immediate duty assignment".

23. Pursuant to said offers, on information supplied by TWA, approximately 1,274 individuals were hired during the week beginning March 7, 1986 as flight attendants. Said individuals were hired, not as "permanent replacements" for striking flight attendants, but rather as permanent additions to TWA's flight attendant work force. As of May 17, 1986, on information supplied by TWA, approximately 1,220 of said individuals were still working as flight attendants. All or nearly all of said individuals have less seniority and/or length of service with TWA than the flight attendants who were on strike until May 17, 1986.

24. On information supplied by TWA, as of May 17, 1986, the date of IFFA's unconditional offer on behalf of the strikers to return to work, approximately 463 individuals were enrolled in training classes at TWA's Training Center in Kansas City, Missouri in an effort to become qualified to be employed as flight attendants. At the time of IFFA's unconditional offer on behalf of striking flight attendants to return to work, those individuals who had not yet completed the required training to

qualify as flight attendants were not employed, and could not lawfully be employed, as flight attendants, and therefore, were not and are not "permanent replacements" for striking flight attendants. On information and belief, certain of those individuals who were still trainees as of May 17, 1986, have completed training since that date and have been employed in flight attendant positions, while other such trainees failed to complete training or were unsuccessful in their efforts to become qualified as and be hired to be flight attendants.

25. On information supplied by TWA, TWA continued after May 17, 1986, to temporarily utilize non-flight attendant employees (such as reservation agents, etc.) to work as "contingency" flight attendants. Such temporary "contingency" employees were not and are not "permanent replacements" for striking flight attendants.

26. At various times during IFFA's strike prior to IFFA's May 17, 1986 unconditional offer to return to work, approximately 1,300 striking flight attendants abandoned the strike and returned to work as flight attendants for TWA (they shall hereinafter the referred to as "cross-over strikers"). Those cross-over strikers were not and are not "permanent replacements" for the flight attendants who continued to strike until May 17, 1986 (who shall hereinafter be referred to as "full-term strikers"). Many of the full-term strikers have greater seniority and/or length of service with TWA than many of the cross-over strikers.

27. Despite IFFA's continuing contention that its strike was an unfair labor practice strike and that TWA, having received an unconditional offer to return to work, must reinstate all the full-term strikers to their jobs, TWA contends that IFFA's strike was solely an economic strike, not an unfair labor practice strike, and TWA has failed and refused to reinstate all the full-term strikers to their jobs.

28. By letter dated May 23, 1984, TWA notified IFFA that it has frozen its active permanent Flight Attendant work force and has placed all full-term strikers on a preferential rehire list

from which they shall be rehired for active service, if immediately available for such service, to fill vacancies in order of seniority.

29. By letter dated May 28, 1986, TWA notified IFFA that it has recalled to employment only 197 of the approximately 5,000 full-term strikers.

30. On information and belief, TWA has assigned some number of the recalled 197 full-term strikers and has announced that it will in the future continue to assign some full-term strikers to be recalled in the future to job categories and/or domicile cities other than those held by such full-term strikers at the time of the commencement of the strike.

31. On information and belief, TWA is treating the flight attendants described above in paragraphs 22 and 23 who were hired as permanent additions to the flight attendant work force on or after March 7, 1986, as if they were permanent replacements for full-term strikers.

32. On information and belief, TWA is treating the individuals who as of May 17, 1986 were still in training attempting to become qualified to be employed as flight attendants as if they were permanent replacements for full-term strikers.

33. On information and belief, TWA has discriminated against and continues to discriminate against many of the full-term strikers because of their exercise of the right to strike under the RLA by failing and refusing to reinstate them to flight attendant positions occupied on and after May 17, 1986 by:

(a) Cross-over strikers who have less seniority and/or length of service with TWA;

(b) The post-March 7, 1986 permanent additions to the flight attendant work force who likewise have less seniority and/or length of service with TWA;

(c) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(d) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

34. On information and belief, TWA has refused and continues to refuse to allow flight attendants who were never on strike (those who as of March 7 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and/or domicile cities upon expiration of their authorized leaves, in effect treating them as full-term strikers.

35. Irrespective of whether IFFA's strike was an unfair labor practice strike as IFFA contends or an economic strike as TWA contends, TWA's conduct described herein violates the RLA, 45 U.S.C. §§151 *et seq*.

WHEREFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that pending the court's determination of the issues presented in Civil Action No. 86-6030-CV-SJ-6, TWA is required by the RLA to reinstate full-term strikers in seniority order to their former job categories and domicile cities to the extent that those flight attendant positions may after May 17, 1986 have been occupied by:

(1) Cross over strikers who have less seniority and/or length of service with TWA;

(2) The post-March 7, 1986 permanent additions to the flight attendant work force who have less seniority and/or length of service with TWA;

(3) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(4) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

(c) A declaratory judgment stating that TWA is required to permit those flight attendants who were never on strike (those who as of March 7, 1986 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and domicile cities upon expiration of their authorized leaves.

(d) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers and non-strikers whose reinstatement rights under the RLA are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

COUNT TWO

36. Plaintiff hereby realleges and incorporates by reference all the allegations set forth in paragraph 1 through 35 of Count One above.

37. On information supplied by TWA, at various times after the first week of the strike, approximately 1,127 individuals were hired as purported "permanent replacements" for striking flight attendants. Said individuals were in addition to the approximately 1,220 permanent additions to the work force described in paragraphs 22, 23 and 31 of Count One and the approximately 463 trainees described in paragraphs 24 and 32 of Count One. Thus, based upon information supplied by TWA, as of May 17, 1986, there were a total of approximately 2,810 individuals TWA contends were and are "permanent replacements" for full-term strikers.

38. TWA had no legitimate and substantial business justification for hiring purported "permanent replacements", as distinguished from temporary replacements, in order to continue to operate during the strike.

39. Since IFFA's May 17, 1986 unconditional offer on behalf of the full-term strikers to return to work, TWA has discriminated against and continues to discriminate against each and every full-term striker because of her/his exercise of the right to strike under the RLA by failing and refusing to reinstate each of them, to the flight attendant position she/he held prior to the strike.

WHEREFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that from and after the May 17, 1986 unconditional offer to return to work, TWA was and is required by the RLA to reinstate each and every full-term striker in seniority order to his/her former job category and domicile city.

(c) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers whose reinstatement rights under the RLA have been, are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

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By: /s/
William A. Jolley

By: /s/
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[Certificate of Service Omitted]

APPENDIX H

Stipulations, filed July 21, 1986, with Excerpt from Exhibit 1 (1981-1984 Collective Bargaining Agreement between TWA and IFFA)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION
Civil Action
No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant.

STIPULATIONS

The parties stipulate that the following facts are not in dispute. They do not stipulate that this is an all-inclusive statement of material facts and each party expressly reserves the right to submit affidavits and/or other evidence as to additional material facts.

1. Exhibit 1 attached is a true and correct copy of the Agreement signed April 12, 1983 between TWA and its flight attendants as represented by IFFA.

2. Exhibit 2 attached is a true and correct copy of TWA's February 29, 1984 notice to IFFA.

3. Exhibit 3 attached is a true and correct copy of the affidavit (with supporting exhibits) of R. Stan Henderson, TWA's Director of In-Flight Services Training, filed by TWA in Civil Action No. 85-1192-CV-W-0 in the Western Division of this Court.

4. The pre-employment flight attendant training program at TWTC, as described in the Henderson affidavit and supporting exhibits (Exhibit 3), continued substantially unchanged from October 1985 until March 7, 1986. During this period, trainees received some, but not all of the service and customer awareness training received by students trained earlier in 1985, resulting in a reduction in total training days from 25 to 17 days.

5. Exhibit 4 attached is a true and correct copy of IFFA's April 27, 1984 notice to TWA.

6. After March 29, 1984, IFFA and TWA representatives met in conference from time to time to discuss their proposals.

7. On or about May 13, 1984, TWA invoked the services of the National Mediation Board ("NMB") to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

8. No agreement had been reached in the IFFA-TWA negotiations by February 4, 1986 and on that date, the NMB notified TWA and IFFA that the 30-day "cooling off" period had begun.

9. Pursuant to the NMB's notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

10. On March 5, 1986, IFFA commenced Civil Action No. 86-6030-CV-SJ-6 in the United States District Court for the Western District of Missouri.

11. TWA and IFFA were unable to reach agreement by midnight, March 6, 1986.

12. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986.

13. Commencing March 7, 1986, and since then, TWA has made various changes in flight attendant rates of pay, rules and working conditions without agreement by IFFA.

14. Exhibit 5 attached hereto is a true and accurate copy of a letter delivered at 10:00 P.M., May 17, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President - Labor Relations, J.W. Hoar.

15. Exhibit 6 attached hereto is a true and accurate copy of a letter delivered on May 18, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President - Labor Relations, J.W. Hoar.

16. Exhibit 7 attached hereto is a true and accurate copy of a letter delivered on May 20, 1986, by J.W. Hoar to Victoria Frankovich.

17. Exhibit 8 attached hereto is a true and accurate copy of a letter delivered on May 21, 1986 by Victoria Frankovich to J.W. Hoar.

18. TWA's business records show that at various times in the weeks preceding the commencement of the strike, it sent mailgrams identical to the example attached hereto as Exhibit 9 (or other written communications substantially similar in content, attached as Exhibit 10-A, B and C hereto) to approximately 1,500 individuals who had completed flight attendant training at TWTC on or before March 6, 1986.

19. TWA's business records show that during the first several days of the strike approximately 1,274 individuals who received Exhibit 9 or 10 were hired as flight attendants. Regardless of their date of report, they were all assigned line seniority dates of March 7, 1986, with the exception of a few who received Exhibit 10-C, and postponed their dates of report.

20. TWA's business records show that as of May 17, 1986, of the original 1,274 flight attendants hired during the first several days of the strike, approximately 1,220 were still working as flight attendants. Of this number, approximately 62 were domiciled in Boston, 260 in New York, 515 in St. Louis, 272 in Los Angeles, and 111 in San Francisco.

21. Individuals who began training on and after March 10, 1986 at the TWTC were hired as TWA employees on their first day of training. Beginning on or about March 10, 1986, individuals who were then enrolled in the TWTC and who had entered training prior to March 8, 1986, were informed that they were TWA employees effective March 8, 1986. True copies of blank forms to be completed by and materials furnished to individuals hired on and after March 8, 1986 are attached as Exhibit 11 hereto.

22. Exhibit 12 attached is a true and accurate copy of an outline provided by TWA to instructors of flight attendants for use during the first week or ten days of the strike.

23. TWA's business records show that after the first several days of the strike approximately 1,590 additional individuals were hired. Of this number, TWA's records show that approximately 1,127 had completed initial flight attendant training as of May 17, 1986, and approximately 463 had not completed initial flight attendant training at TWTC as of May 17, 1986.

24. The approximately 463 individuals who had not completed initial flight attendant training as of May 17, 1986, were hired and trained in anticipation of flight attendant vacancies that were expected to open in June, 1986. Some of said trainees who had completed training after May 17, 1986 were used as active flight attendants beginning the last week of May, during the transition period into the peak June schedule.

25. TWA's business records show that all of the flight attendants who were newly-hired after the commencement of the strike, and who actually worked one or more flights as

active flight attendants, were classified as "cabin attendants" as distinguished from "flight pursers" or "service managers".

26. TWA's business records show that approximately 1,284 individuals who were employed as flight attendants immediately prior to the commencement of the strike crossed the IFFA picket lines and reported to work before 10:00 P.M., May 17, 1986. The breakdown of this group (which shall be referred to as "cross-overs") by domicile and job category is as follows:

Domicile	*Service Managers*	*Cabin Attendants*	*Total*
Boston	23	5	28
New York	160	388	548
St. Louis	47	441	488
Los Angeles	62	99	161
San Francisco	28	31	59
	320	964	1,284

27. TWA has credited the cross-overs with the length of service they had as of March 7, 1986, plus whatever additional length of service they accrued by working during the strike.

28. As of May 17, 1986, there were several hundred cross-overs working as flight attendants who had less length of service with TWA than certain flight attendants, who were on strike as of May 17, 1986, had as of March 7, 1986.

29. All, or nearly all of the individuals hired on or after March 7, 1986, who were working as flight attendants as of May 17, 1986, have less length of service with TWA than the flight attendants who were on strike as of May 17, 1986, had as of March 7, 1986.

30. Exhibit 13 attached is a true and accurate copy of a letter dated May 23, 1986 from J.W. Hoar to Victoria Frankovich.

31. Exhibit 14 attached is a true and accurate copy of one example of a form letter that was sent by TWA on or about May 24, 1986 to approximately 197 flight attendants who as of

that date were shown on TWA's records as having been on strike on May 17, 1986.

32. Exhibit 15 attached is a true and accurate copy of a letter hand delivered May 28, 1986, from J.W. Hoar to Victoria Frankovich, including a list of 197 flight attendants whom TWA had contacted for return to active service.

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ARTICLE 24

UNION SECURITY

(A) Each employee now or hereafter employed in any classification covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such conditions shall not apply with respect to any employee to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification, or with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his/her classification as a condition of acquiring or retaining membership.

The condition of payment shall be met if the amount due is tendered to the Secretary-Treasurer of the Union in person or is mailed to him/her within the prescribed time limits.

For the purpose of this Article, "membership in good standing in the Union" shall consist of the payment by the employee, not later than the last day of the following calendar month, of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership. The employee may have his monthly membership dues deducted from his earnings as provided in paragraph (M) of this Article, or he/she may pay his/her membership dues directly to the Union.

* * *

APPENDIX 1

Plaintiff IFFA's Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC,
Defendant.

PLAINTIFF IFFA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now Plaintiff, the Independent Federation of Flight Attendants (hereinafter "IFFA"), by and through its undersigned counsel, and respectfully moves this Court for an order granting Plaintiff IFFA summary judgment in its favor on Count I of its First Amended Complaint in Civil Action No. 86-6084-CV-SJ-6 and directing Defendant TWA to reinstate those flight attendants who remained on strike until May 17, 1986 ("Full-term strikers"), the date of Plaintiff IFFA's unconditional offer to return to work, to those jobs that on or after May 17, 1986 have been occupied by: (1) nearly 1,300 less senior flight attendants who crossed IFFA's picket lines and returned to work prior to the union's unconditional offer to return (the "cross-overs"), (2) some 1,220 flight attendants who were hired during the first few days of the strike as

"permanent additions" to the work force, rather than as "permanent replacements" for strikers, and (3) approximately 463 individuals who, as of May 17, 1986, had not yet completed the initial training necessary to be qualified to be employed as flight attendants, and for whom no job vacancies yet existed as of that date on the grounds that there are no material issues of fact in dispute and Plaintiff is entitled to Summary Judgment as a matter of law.

Plaintiff IFFA files herewith its Suggestions in Support of its Motion for Partial Summary Judgment.

Respectfully submitted,

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Tel: 816-474-1240

By /s/
Doyle R. Pryor

/s/
John P. Hurley

/s/
Scott A. Raisher

[Certificate of Service Omitted]

APPENDIX J

Defendant TWA's Cross-Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-CV-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant.

DEFENDANT TWA'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Trans World Airlines, Inc. ("TWA"), by and through its undersigned counsel, respectfully moves this Court for an order denying the motion of Plaintiff Independent Federation of Flight Attendants ("IFFA") for summary judgment in its favor on Count I of IFFA's First Amended Complaint herein, and granting summary judgment in TWA's favor on Count I of the First Amended Complaint.

TWA files herewith its Suggestions in Opposition to IFFA's Motion for Partial Summary Judgment and in support of TWA's Cross-Motion for Partial Summary Judgment in its favor, with the supporting affidavits with appended exhibits of William S. Borden, R. Stan Henderson, J.W. Hoar, Joyce Coleman, Donald Fleming, Jill Jones and Dirk Siedlecki.

Respectfully submitted,

Dated: Kansas City, Missouri
August 12, 1986

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APPENDIX K

Scheduled Skyways, Inc., 10 N.M.B. 488 (1983)

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

10 NMB No. 153

CASE NO. R-5419

In the Matter of the
Application of the

AIR LINE PILOTS ASSOCIATION

alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

SCHEDULED SKYWAYS, INC.

DETERMINATION OF ELIGIBILITY

September 2, 1983

On June 13, 1983, the Air Line Pilots Association (ALPA) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, alleging the existence of a representation dispute involving employees of Scheduled Skyways, Inc. designated as "Flight Deck Crew." This application has been docketed as NMB Case No. R-5419.

At the time the application was filed, these employees were not represented by any organization or individual.

The Board assigned Board Representative Samuel J. Cognata to investigate. On August 10, 1983, the Board found a dispute to exist, and authorized an all-mail ballot election using a cut-off date of August 7, 1983.

During the course of the investigation, ALPA objected to the inclusion of James Osburn and Robert Shields, claiming that these employees were ineligible as they were in training as of the cut-off date. Board Representative Cognata ruled these employees ineligible, and the carrier appealed this ruling on August 22, 1983. On August 25, 1983, the Board postponed the ballot count, scheduled for September 2, until this eligibility issue had been resolved. On August 29, 1983, ALPA advised the Board that it now concurred with the carrier that James Osburn and Robert Shields are eligible voters. [489]

ISSUE

The issue is whether James Osburn and Robert Shields are ineligible to vote due to their status as trainees.

CONTENTIONS

The carrier asserts that Osburn and Shields are eligible because they are licensed pilots who share a complete community of interest with the pilots determined to be eligible in this case. The carrier further contends that a *bona fide* employer-employee relationship existed between the carrier and Osburn and Shields prior to and on the cut-off date. ALPA concurs with the carrier that these employees are eligible.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 201, Title II, and Section 2, Title I, of the Railway Labor Act, as amended, 45 U.S.C. §181, 152. Accordingly, the Board finds as follows:

I.

Scheduled Skyways, Inc. is a common carrier by air as defined in Title II, Section 201 of the Act, 45 U.S.C. §181.

II.

Section 2, Fourth, of the Act, 45 U.S.C. §152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the the representatives of the craft or class for the purposes of this Act." [490]

III.

Section 2, Ninth, of the Act, 45 U.S.C. §152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representatives of such employees, if any. In determining the choice of the majority of employees under this section, the Board is required to designate who may participate as eligible voters in the event an election is required.

IV.

ALPA is a labor organization and representative as defined in Section 1, Sixth, 45 U.S.C. §151, Sixth, and Section 2, Ninth, 45 U.S.C. §152, Ninth, of the Act.

FINDINGS OF FACT

I.

James Osburn was hired by the carrier as a pilot on July 24, 1983. He began his ground school training on August 5 and completed it on August 11. He began flight training on August 13, 1983.

II.

Robert Shields was hired as a pilot on July 10, 1983, began ground school training on July 22, and completed ground school training on August 11. Shields began flight training on August 13, 1983.

III.

According to the Carrier, both Osburn and Shields have received the minimum monthly flight pay guarantee during their training, and have enjoyed the same fringe benefits as other pilots, including vacation benefits, and health and welfare benefits. Both Osburn and Shields report to the same supervisory officials and are subject to the same policies and procedures as pilots who have completed their training. [491]

IV.

Robert Shields began on-line flying for the carrier on August 18, 1983. James Osburn commenced on-line flying on August 16, 1983.

DISCUSSION

I.

Training is required for all pilots under the Federal Aviation Regulations, and pilots receive training throughout their careers. *See, e.g., United Airlines*, 9 NMB No. 79 (1982) and 10 NMB No. 145 (1983).

II.

In *Midstate Airlines*, NMB Case No. R-4668 (1976), when faced with the same factual circumstances, the Board found a pilot in training to be eligible to vote. No evidence has been presented which would indicate a different result here where the employees in training are receiving the same pay and benefits as the other pilots.

CONCLUSION

The Board finds that Osburn and Shields were part of the craft or class of "Flight Deck Crew Members" on Scheduled Skyways as of the cut-off date, and are, therefore, eligible to vote. [492]

Based on the foregoing, the carrier's appeal of Board Representative Cognata's eligibility ruling is upheld. Ballots previously impounded will be counted forthwith.

By direction of the NATIONAL MEDIATION BOARD.

/s/
Rowland K. Quinn, Jr.
Executive Secretary

Copies to:

Mr. Robert L. Shults
Laurence R. Arnold, Esq.
Mr. John P. Bradley
Robert A. McCullough, Esq.
Mr. Henry A. Duffy
Mr. Samuel J. Cognata

RKQ/mja

QUESTIONS PRESENTED

1. Under the Railway Labor Act, does an employer impermissibly discriminate among its employees by granting permanent strike replacement status to "cross-over" employees who abandoned the strike to return to work before it ended, thereby granting them preference in reinstatement at the conclusion of the strike over more senior "full-term" striking employees?

2. Under the Railway Labor Act, are individuals who are hired during a strike to become permanent strike replacements, but at the conclusion of the strike are still undergoing formal training away from the situs of the work and have not yet performed any services for the carrier within the meaning of 45 U.S.C. § 181, entitled to be considered as permanent strike replacements not subject to displacement by returning strikers?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-548

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petitioner Trans World Airlines, Inc. (hereinafter "TWA") seeks review of a decision of the United States Court of Appeals for the Eighth Circuit which affirmed the district court's ruling under the Railway Labor Act (hereinafter "RLA") that individuals who were still engaged in formal training at an off-site training facility to become flight attendants at the conclusion of a strike could not be retained and thereby displace returning strikers, and which reversed the district court, holding instead that cross-over strikers who had earlier abandoned the strike likewise could not be retained and thereby displace returning strikers who have greater seniority. The district court had also held in favor of TWA's position with respect to a group of new hires employed at the beginning of the strike; that they were

permanent strike replacements and, therefore, could lawfully be retained at the end of the strike rather than being subject to displacement by returning strikers. This latter holding was affirmed by the Eighth Circuit, and review of this holding has not been requested.

The respondent Independent Federation of Flight Attendants (hereinafter "IFFA") submits that the questions presented by this case are not appropriate for review by this Court and, therefore, opposes the granting of this petition. Despite its efforts in arguing for such review, which includes a generous sprinkling of hyperbole and rather intemperate use of invective directed at some of the panel's reasoning, TWA simply has not shown that the Eighth Circuit's decision, of which a petition for rehearing *en banc* was denied, departs from precedent established by this Court or that it is in material conflict with the decisions of any of the other circuit courts.

IFFA is basically satisfied with TWA's statement of the case and summary of facts in its petition, except for the need to point to certain misstatements contained therein. In the middle of page 4, for instance, TWA asserts that an effect of the decision below is that:

> . . . permanent employees [cross-overs] with considerably more time in the employ of the carrier [than the new hire replacements]—who elected not to support the strike or to return to work at a time when vacancies existed—must surrender their jobs when the strike comes to an unsuccessful end, to the very strikers who were replaced by the new hires . . .

This statement contains several inaccuracies in it. The decision does not require cross-overs to be displaced by senior strikers who were actually replaced by new hires. Rather, it simply requires certain less senior cross-overs to give way to more senior full-term strikers who were replaced, not by new hires, but impermissibly by those less senior cross-overs under the guise that they too were entitled to permanent strike replacement status.

On page 5 of the petition, TWA states that it and IFFA "were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984." This is, of course, contrary to the holdings of both lower courts in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 809 F.2d 483 (8th Cir. 1986), *cert. granted*, 107 S.Ct. 3183 (1987), which held that the parties' agreement is still in effect, having a duration clause which made it "amendable" as of July 31, 1984 upon the service of notice of intended change.

On page 6, TWA inaccurately states that Count I of IFFA's complaint asks for displacement of "all" of the approximate 1280 cross-overs. In fact, not only the complaint (53a-54a), but the stipulations of fact (61a), and IFFA's motion for summary judgment (64a-65a) make it quite clear that it was seeking to enforce the right of full-term strikers to displace only those cross-overs being retained with less seniority.

There is also a misstatement at page 7 in the petition, where TWA first describes the Eighth Circuit's "curious rationale"—that the trainees were not "employees" as defined by the RLA and, thus, could not be permanent strike replacements—and then goes on to claim that this had not even been argued by IFFA before the lower courts. This is simply not the case. While it was stipulated that these trainees were hired and told by TWA that they were employees, the thrust of IFFA's argument before both of the lower courts was that they were not "flight attendant employees", i.e., bargaining unit employees, because they had not yet completed their training and were, therefore, not yet ready to begin performing the work of flight attendants for TWA.

Finally, it should be noted, with respect to the fact recited by TWA on page 6 regarding its having filled the 200 or so vacancies which existed at the time the strike

ended by "rehiring" strikers, that TWA actually recalled the approximate 200 full-term strikers to fill these vacancies in the order of their contractual seniority.

Specifically, the Eighth Circuit's decision is grounded on the basic principle articulated by this Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), that economic strikers are entitled to reinstatement to their former jobs upon their unconditional offer to return to work. This is coupled with the principle established in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) which restricts an employer's right to implement any policy which would adversely affect employees' job security, job selection, or other benefits because of their participation in a strike. The decision below stresses the point that a discriminatory grant of permanent strike replacement status to the cross-over employees regardless of their seniority relative to other striking employees differentiates between the employees strictly on the basis of the degree of their union activity. This, in turn, is likely to create long-term conflict among the two artificially divided groups of employees. With respect to the trainees' issue, the decision below was based upon a reading of very clear statutory language and buttressed by recent precedent in the Seventh Circuit interpreting that language, as well as relying upon reasoning found in analogous NLRA precedent. With respect to each issue, the Eighth Circuit correctly recognized that this Court's holding in the *Mackay* decision [1] upon which TWA places principal reliance in seeking this review, is but an *exception* to the general principle concerning an economic striker's entitlement to reinstatement. This was made especially clear in this Court's holding in *NLRB v. Fleetwood Trailer Co.*,[2] and, as the decision below also found, such an exception should be narrowly construed rather than broadly expanded as TWA urges.

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[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[2] 389 U.S. 375 (1967).

The petition for certiorari should be denied because, as we hereafter show, the Eighth Circuit's decision below on each question is in accordance with the existing precedent in this area of the law, and the claimed conflicts with other decisions do not exist.

ARGUMENT

I. The Eighth Circuit's Decision Finding TWA's Grant Of Permanent Replacement Status To Its Cross-over Employees To Be Unlawful Discrimination Under The RLA Is In Harmony With This Court's *Mackay* And *Erie Resistor* Decisions And Does Not Conflict Materially With Decisions Of The Sixth And Seventh Circuits.

A. *The court's rationale is based upon the traditional balancing of the rights of the employer and employees in a strike situation which the courts and the NLRB are consistently called upon to do.*

In reaching its decision regarding the cross-overs' issue, the Eighth Circuit did nothing more than to correctly apply the fundamental principles set forth in this Court's decisions in *Fleetwood Trailer* and *Erie Resistor* as they applied to the unique set of facts in the underlying case. Essentially these principles call for a balancing of the right of employees engaged in an economic strike to be reinstated to their former or substantially equivalent positions upon their unconditional offer to return to work, and the employer's right to attempt to continue to operate his business during the strike hiring permanent *replacements* if necessary to fill vacancies left by the strikers. *NLRB v. Fleetwood Trailer Co., supra*, at 378; *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

The application of this balancing test can be sometimes difficult, and in no sense is one side's right preordained, as is shown by the Eighth Circuit's affirmation

of the district court's ruling on the so-called new hires category—that *they* were permanent strike replacements—which was contrary to IFFA's position taken in this litigation. Thus, the decision below reflects nothing other than adherence to the *Mackay permanent replacement exception* to the general well-established principles of *Fleetwood* and *Erie Resistor*. Rather than an anomaly or a curious result as alleged by TWA, the lower court decision merely adheres to the *Mackay* exception (which, in every application here, results in non-seniority individuals continuing to work after the strike at the expense of more senior incumbent employees) by recognizing that some 2200 senior full-term strikers were replaced by new hires as *permanent replacements;* and it adheres to *Fleetwood* and *Erie Resistor* by recognizing that as to all other striking employees *not* permanently replaced, TWA impermissibly discriminated on the basis of union activity by allocating jobs on the basis of the extent of participation in a lawful and protected strike.

The decision below clearly focused on the question central to this issue, namely, whether the cross-overs could be given or "awarded" the status of permanent strike *replacements* as defined in the *Mackay* holding. The court correctly concluded that they could not, and, that for the petitioner to have attempted to grant such a status to them and retain them at the end of the strike in preference to more senior, full-term striking employees was unlawful discrimination based upon the principle set forth in *Erie Resistor*. More specifically, while recognizing that there were certain factual differences between *Erie Resistor* and the underlying case, with the former involving a grant of post-strike super-seniority, the decision below recognized that the same concerns voiced in *Erie Resistor* were present here in this case. These concerns called for a condemnation of a grant of any type of benefit (pre-strike or post-strike) which would be so "inherently destructive" of the right to strike as

to be unlawful discrimination without the need of further inquiry into the employer's motivation. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967); *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). In the underlying case, the court found the grant or "awarding" of permanent *replacement* status to the cross-overs to be just such a discriminatory grant of a benefit to be condemned under the principles of *Erie Resistor*. It rejected TWA's arguments that the granting of such a status is a corollary of both the employees' right to refrain from engaging in strike activity and the employer's right to retain these cross-over employees as an alleged element in its array of self-help weapons available to it during a strike.

Rejecting the principal thrust of TWA's argument herein, the court found that the *Mackay* exception was not applicable because of its finding that cross-overs do not acquire the status of permanent *replacements*. Contrary to TWA's urging, however, this finding does not represent a departure from the established law governing reinstatement of economic strikers; it constitutes at best merely a refinement of that law given the particular context of this case, arising as it did under the RLA and with a substantial number of the terms of the parties' collective bargaining agreement including the union security provision still remaining in effect during the strike.

The continued existence throughout the strike of the collective bargaining agreement and its union security clause were indeed relevant considerations forming a part of the basis for the Eighth Circuit's finding of discrimination. The finding of discrimination was based not upon union membership in and of itself but upon the *degree* of the members' union activity, i.e., how long they stayed on strike. This form of discrimination is just as invidious and with the same long-term divisive

effects as that which was condemned by this Court in *Erie Resistor*.[3]

B. *The court's ruling does not materially alter the balance of bargaining power between employers and unions or materially conflict with application of these basic principles by other circuit courts.*

In urging review of this case, TWA made several incorrect statements as to certain alleged rights of employers and employees during an economic strike. As an example, there is no authority for the statement that an employer has the right, as one of his "principal self-help weapons" under the RLA, or under the NLRA for that matter, to retain cross-over employees on a permanent basis the same as he does with new hire strike replacements by virtue of the *Mackay* exception. To the contrary, as the court noted in its opinion below, neither the Seventh Circuit in its decisions in the *J. L. Clark Co.* and *Giddings* cases nor the Eighth Circuit itself in the *Randall* case[4] lend support to the proposition that an employee who abandons a strike and crosses over to

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[3] Perhaps even more so under the RLA, there has been a good deal of emphasis placed upon the "community" of striking employees. In *BRAC v. FEC Railway Co.*, 384 U.S. 238 (1966), this Court stated:

> These collective bargaining agreements [under the RLA] are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation. (384 U.S. at 246)

The Eighth Circuit's reliance upon the continued existence of the collective bargaining agreement is in harmony with this emphasis.

[4] *International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982); *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

work during that strike acquires the status of a permanent replacement under the *Mackay* exception.

In another attempt to divert attention from the real issues herein, TWA speculates that the decision below would tend to eliminate "the principal motivation" that employees with less seniority supposedly would have to abandon a strike and return to work, this motivation being to assure themselves that they would still have a job at the end of the strike at the expense of the more senior full-term strikers. IFFA submits that whether this presumed motivation is likely in the minds of most returning strikers, or whether it might be one or more of the many other considerations which can motivate an employee to cross over a picket line and abandon his fellow strikers, is not particularly relevant to the issues with which the lower court dealt. Reduced to basics, TWA's argument is that, as a part of its arsenal of self-help weapons, it must be able to promise employees that if they abandon a strike that they earlier began, they can leapfrog over the backs of their fellow employees and fellow strikers and assure themselves a higher place of employment. This is contrary to the Act and is greatly beyond the scope of the limited *Mackay* exception that allows an employer to promise permanent employment to *replacements*. The notion that employees can vote for a strike, begin that strike and then turn that strike to their own personal advantage by jumping ahead of their co-strikers has no precedent under the letter of the spirit of the Act or any judicial interpretation of that Act. In any event, the decision below properly focused upon the elimination of the unfairness of allowing an employer to grant preferences in reinstatement to economic strikers based solely upon the degree of their strike participation, which is after all the primary if not the ultimate form of union activity.

TWA places a great deal of reliance upon its assertion that the Eighth Circuit's ruling on the cross-overs con-

flicts with the Sixth Circuit's decisions in *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) and *NLRB v. American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987) and with the Seventh Circuit's decision in *Giddings & Lewis, Inc. v. NLRB, supra.* This claimed conflict simply does not exist.[5]

The cross-overs' issue involved in the decision below was never squarely before the Sixth Circuit in either of these cases nor was it before the Seventh Circuit in *Giddings* at all, as the court below pointed out. In *Harrison Ready Mix*, the issue before the Sixth Circuit panel involved whether certain cross-overs *themselves* had been discriminated against by post-strike preferential treatment which had been accorded certain new hire permanent replacements. It did not even involve a claim of discrimination against full-term strikers. In the *American Olean* case, the issue before that panel, as the dissent makes clear, was whether returning strikers, in this instance cross-overs who had abandoned the strike, are *fully* reinstated if they decide to accept offers to fill jobs which are undisputedly not their former positions nor even substantially equivalent ones. The panel majority, in disagreement with the NLRB and union in that case, found that "[t]he law requires reinstatement [of economic strikers] when a vacancy occurs for which an offeror (sic) is qualified, whether in his previous position or a substantially equivalent one or not." Moreover, the union's contention in *American Olean* was that the discrimination against the strikers occurred in connection with post-strike preferential transfers from one plant location to another, which reveals further the dissimilar-

[5] TWA is unable to claim that the decision below conflicts with any decision which has been decided under the *RLA* by another circuit court where, as is true in the instant case, there is the finding unique to the RLA of the continuation of the collective bargaining agreement during the strike due to its "amendable" character.

ity of the issue in that case compared to the one for which review is requested herein.

II. The Decision Below Affirming The District Court's Ruling That The Approximate 463 Trainees Did Not Acquire The Status Of Permanent Replacements Draws Its Essence From Prior Judicial And NLRB Precedent And Is Not In Conflict With The Second And Seventh Circuits.

A. *Contrary to being in conflict with the Seventh Circuit, the Eighth Circuit's decision as to the trainees' issue rests primarily upon the Seventh Circuit's* ALPA v. United Airlines *decision.*

The Eighth Circuit concluded that the Seventh Circuit's decision in *ALPA v. United Airlines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987), and specifically its RLA employee definitional test (802 F.2d at 913), was dispositive of the trainees' issue in the underlying case. The court below considered the factual differences between the *ALPA* case and the instant one to be irrelevant, and its reliance upon the express terms found in the "employee" definition under Section 201 of the RLA (45 U.S.C. § 181) is a sound and reasonable interpretation of that Act. The "work performance factor" which the court found lacking with regard to these trainees is certainly an essential element in the definition of an employee under the Act. Arriving at the conclusion, then, that these trainees could not have acquired the status of permanent replacements at the time that the strike ended is a logical and reasonable one, in harmony with the spirit and purpose of the RLA.

In its petition, TWA engages in hyperbole when it makes the claim, at page 19, that the Eighth Circuit by its ruling that the trainees' lack employee status has ". . . eliminated, with a few conclusory paragraphs, the organizational and representational rights of an untold number of employees . . ." As the court took pains to point out, its ruling is even consistent with the treatment

that both the carrier and the Union accorded the trainees in the past, indeed all the way up to the beginning of this strike. Trainees were never included within the bargaining unit nor covered by any of the collective bargaining agreement terms. They were not even considered to be "employees" as defined by the Fair Labor Standards Act.[6]

In the same vein, TWA's protestations that the holding is contrary to the rulings of the National Mediation Board are misplaced. The NMB is charged with deciding pure representational disputes under the RLA which includes conducting hearings on elections and determining voter eligibility issues. In terms of determining who is eligible to vote in an election, the Board usually takes an expansive approach in arriving at eligibility decisions in order to avoid disenfranchisement of voters. Representative of this approach has been the Board finding eligible to vote individuals such as furloughed or laid-off employees, dischargees who have pending grievance claims seeking reinstatement, employees on extended leaves of absence, and even former employees who have been terminated as a class but who are plaintiffs in a lawsuit challenging their terminations. *Air Canada v. NMB*, 107 LRRM 2028, 2032 (S.D. N.Y. 1980), aff'd, 659 F.2d 1057 (2nd Cir. 1981), *cert. denied*, 454 U.S. 965 (1981). Thus, an NMB ruling, such as the one cited by TWA determining trainees to be eligible voters, arises in a context governed by rules and policies which is different than that which the court below addressed.

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[6] In a 1983 unpublished decision, *Donovan v. Trans World Airlines, Inc.*, No. 77-0881 (W.D. Mo. March 4, 1983) (reprinted as Appendix L), the district court ruled that flight attendant trainees in TWA's training academy did not meet the definition of "employees" under that Act in an action brought by the Secretary of Labor pursuant to the minimum wage, overtime and record-keeping provisions of the Act (29 U.S.C. § 201, et seq. See also, *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982).

B. *In finding support for its ruling on the trainees' issue from NLRA precedent as well, the court correctly analyzed and applied the balancing test found in* Mackay.

The court correctly noted that there was indeed a "balancing test" applied by the *Mackay* court when it established the exception allowing an employer during an economic strike to hire and permanently retain replacements for strikers without committing an unfair labor practice under the NLRA. In its decision below, the Eighth Circuit's conclusion, that this balance tips in favor of IFFA's position because of the lack of any visible business need for TWA to place these trainees into working positions after the strikers had already unconditionally offered to return to work, is a rational application of the *Mackay* decision.

Contrary to TWA's additional assertion, moreover, the court did not make a *factual* finding regarding the lack of a business need; it merely applied the principles of law found in *Mackay*, *Fleetwood* and *Erie Resistor* to the stipulated facts in the record.

C. *The Eighth Circuit did not invalidate the district court's two-day rule; it simply found the RLA employee definitional approach to be controlling.*

TWA's supposition that the Eighth Circuit recognized the district court's two-day rule or training school exception as being "invalid" is not well-founded. A fair reading of the court's decision with respect to this issue reveals that it simply chose not to adopt the district court's rationale in view of the more compelling RLA precedent offered by the *ALPA v. United Airlines* decision, coupled with its analysis of the facts in the instant case in light of the RLA's express terms found in the definition of an employee.

The court further observed that the district court had not had the benefit of the Seventh Circuit's *ALPA* opin-

ion at the time it was called upon to decide this issue, but it did not necessarily take issue with the district court's analysis which had focused almost entirely upon NLRA precedent. Indeed, the Eighth Circuit agreed with the district court that the NLRA case precedent supports the finding that the trainees had not acquired the status of permanent replacements at the time the strike ended. (13a).

CONCLUSION

The respondent Independent Federation of Flight Attendants urges the denial of the certiorari petition.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 77-0881-CV-W-9

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

TRANS WORLD AIRLINES INC.,
Defendant.

March 4, 1983

RALSTON.

[Statement of Case]

Magistrate: This is an action brought by the Secretary of Labor (Secretary) pursuant to the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., against Trans World Airlines, Inc., (TWA) to obtain injunctive relief prohibiting future violations of the Act, and to recover backwages and liquidated damages.[1] The Secretary asserts that since December 12, 1974, TWA has

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[1] The action has been assigned to the undersigned United States Magistrate for trial and decision pursuant to the Magistrate Act, 28 U.S.C. § 636(c), upon the written consent of the parties. The proceedings have been delayed pending resolution of the American Airlines litigation concerning the operation of a similar training facility for flight attendants. See Donovan v. American Airlines, Inc. [92 LC P 34.079] 514 F.Supp. 526 (N.D. Tex. 1981), affirmed [95 LC P 34,258] 686 F.2d 267 (5th Cir. 1982).

violated the Act by failing to pay minimum wage benefits and overtime pay to individuals while they were trained as flight attendants and by failing to keep accurate pay records. TWA, on the other hand, contends that persons in training as flight attendants were not entitled to the benefits of the Act, and therefore neither the minimum wage and overtime, nor the recordkeeping requirement of the Act have been violated. Because the testimony and evidence presented at trial, when viewed in light of existing law, supports the position of TWA, judgment will be granted in its favor and against the Secretary.

TWA is a major commercial airline engaged in domestic and international air transportation.[2] It maintains a part of its headquarters in Kansas City, Missouri. In operating its business, TWA must train and employ individuals for various flight crew positions,

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[2] The parties have stipulated, among other things, the following:

(a) TWA is an enterprise within the meaning of Section 3(r) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§ 201, et seq.);

(b) TWA is an enterprise engaged in commerce within the meaning of Section 3(s)(1) of the Act;

(c) Since December 12, 1974, TWA has had employees engaged in commerce including employees handling or otherwise working on goods or materials that have been moved in or produced for commerce;

(d) TWA is a carrier by air subject to the provisions of 45 U.S.C. §§ 181-188;

(e) TWA is an air carrier engaging in interstate and overseas air transportation under a Certification of Public Convenience and Necessity or other appropriate economic authority issued by the Civil Aeronautics Board (CAB);

(f) TWA is a certificate holder within the meaning of 14 C.F.R. Part 121, subparts G, M, N, O, and T subject to the provisions of that Part.

including, among others, that of flight attendant.[3] The controversy herein primarily concerns the relationship between TWA and persons selected for flight attendant training during the first four weeks of the instructional course offered by TWA at its Breech Training Academy in Overland Park, Kansas.[4] Simply stated, if persons in the first four weeks of flight attendant training are "employees" under the Act, specifically the provisions of 29 U.S.C. §§ 203(e)(1) and (g), then TWA is required to pay them the minimum wage and overtime benefits specified by 29 U.S.C. §§ 206 and 207, and to maintain appropriate pay records. If those persons should not be so characterized, then TWA has not violated the Act with respect to them.

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[3] Federal Aviation Regulations provide that the persons constituting the minimum complement of flight attendants required by 14 C.F.R. § 121.391 must have received the training specified by those subsections of 14 C.F.R. §§ 121.415, 121,417 and 121.421 applicable to flight attendants and the type of aircraft on which they serve as flight attendants. The flight attendant training program for safety and emergency procedures required of TWA must be approved by the Administrator of the Federal Aviation Administration (FAA). TWA need not be the entity giving the training required for flight attendants before they are qualified to serve as crew members aboard TWA aircraft. Training to qualify persons to serve as flight attendant crew members of TWA aircraft may be given by a training facility entirely independent of and having no affiliation with TWA provided the training curriculum at the non-affiliated facility with respect to safety and emergency procedures is approved by the Federal Aviation Administrator for flight attendants who would serve on aircraft of the type and model operated by TWA. However, at no time since December 12, 1974, has TWA allowed any person hired since that date to serve as a flight attendant on its aircraft without satisfactorily completing the flight attendant training course given by TWA at its Breech Training Academy.

[4] The facility is located in the greater Kansas City metropolitan area.

Findings of Fact

Through the years, the job of flight attendant has proven highly desirable to a large number of people. In meeting its flight attendant needs, TWA has selected a few hundred potential flight attendants from literally tens of thousands of applicants. For example, during the years 1975 through 1978,[5] TWA selected between approximately 450 to 980 persons [6] for flight attendant training from the approximately 25,000 to 60,000 persons who applied.[7] Of those selected for flight attendant training, between 85% to 95% successfully completed the course of training administered by TWA and went "on line." [8]

In selecting persons for flight attendant training from the thousands of applicants, TWA narrowed the field by

[5] Although the Secretary seeks continuing relief, the testimony and evidence at trial focused on a period commencing on December 12, 1974, and continuing through December 12, 1977. In recent years, the business of the airlines has changed radically, causing a sharp decline in the need for new flight attendants. For that reason, TWA has largely discontinued use of the Breech Training Academy for training its own flight attendants, although it has used the facility for training flight attendants for other airlines. TWA has contemplated the sale of the facility.

[6] The following number of flight attendant trainees attended classes at the Breach Training Academy during those years: 1975-820 persons; 1976-458 persons; 1977-985 persons; 1978-505 persons.

[7] The following number of persons applied for the position as flight attendant during those years: 1975-28,600 applicants; 1976-30,900 applicants; 1977-62,500 applicants; 1978-25,400 applicants.

[8] The following number of flight attendant trainees who were trained and graduated from the training course at Breech Training Academy went "on line" during those years: 1975-778 flight attendants; 1976-410 flight attendants; 1977-837 flight attendants; 1978-476 flight attendants. However, at least one witness at trial testified that she was furloughed immediately after her training and did not go "on line" for a period of time.

employing an application and interview process [9] designed to identify those persons who met its standards, could successfully complete the training course, and were likely to continue as flight attendants after training. TWA attempted to forecast its "on line" vacancies so as to match the number of graduating flight attendants to those vacancies. To make a determination of its flight attendant needs, personnel of TWA's Departments of In-Flight Services and Budget Control took into consideration historical data concerning the levels of business during given months, vacations, resignations, sick and injury leaves, training completions, and other relevant factors. Because the business of the airlines is largely seasonal, TWA personnel attempted to adjust for peak and slack periods. As accurately as possible, they matched vacancies with trained flight attendants throughout the seasons.[10] Judging from their results, they were successful in that endeavor. They predicted their flight personnel needs "within one to two percent accuracy." [11]

[9] Prior to acceptance into the flight attendant training at the Breech Training Academy, applicants underwent three separate screening interviews and a complete physical examination.

[10] In 1980, the Department of Transportation, in an "Aviation Careers Series" publication entitled "Aviation Education," noted that "[t]he value of the airlines flight attendant training program amounts to several thousand dollars per student." In fact, one witness at trial testified that Braniff International Airlines once charged more than $300 in tuition for its flight attendant training. Obviously, the cost to TWA was equally high. Therefore, it was imperative for TWA to achieve a high level of forecasting accuracy in matching trainees to vacant positions to provide a sufficient number of flight attendants on the one hand, and to aviod unnecessary expenses in training unnecessary flight attendants.

[11] Despite this success rate, the graduating trainees did not always immediately step into "on line" positions. At least one witness at trial testified that she was furloughed for a period of time after her training because of a slump in business. Also, the parties have stipulated that at one time TWA overestimated its need for flight attendants.

Prior to their acceptance for flight attendant training, applicants were advised, in writing, that they would not be considered employees of TWA until their successful completion of flight attendant training. They each signed a written "Flight Attendant Application Agreement" by which they acknowledged that fact. Moreover, each flight attendant trainee understood that no compensation would be paid by TWA during the period of their training at the Breech Training Academy and that they would not be compensated until they went "one line." While a few flight attendant witnesses testified at trial that they felt they had been "hired" by TWA upon their acceptance for training, virtually to a person this feeling was based upon confidence that he or she would successfully complete training.

[Training Facility]

All TWA flight attendant trainees who were trained during the relevant period of time attended the Breech Training Academy.[12] While there was no written policy that required trainees to live at the training facility, trainees were expected to do so, and few, if any, flight attendant trainees resided outside the Academy during training. The Academy is a large, modern facility which incorporates several "living and learning centers," each designed to accommodate a class of twenty persons. In many respects, both the physical surroundings and the educational atmosphere resemble that of a college

[12] It is stipulated that "[d]uring the period of time embraced by [the Secretary's] action TWA's internally established policy was not to assign persons to active duty as flight attendants unless they had received and satisfactorily completed at TWA's Breech Training Academy the initial training required by [federal regulations]." In addition to the federally-mandated safety and procedures training, TWA also required its flight attendant trainees to complete other phases of its training course, even if they had previously qualified to serve as flight attendants on the type of aircraft operated.

campus. The living areas include rooms "like a nice hotel room, a Hilton class, or a Marriott class hotel room." Each individual room measures approximately 20′ by 20′ and contains two beds, a study carrel with a large desk and indirect lighting, and a private bath. The rooms are grouped around a central "sunken pit" conversation area which is equipped with a color television set and lounge furniture. In addition, the Academy includes a swimming pool and tennis courts. Meals are provided in a central cafeteria. The learning centers were designed to accommodate the most modern teaching methods.[13] They include classroom seating, advanced audio-visual equipment and aircraft mockups for "hands on" training.

During the first four weeks of training, flight attendant trainees received no wages or monetary compensation from TWA. However, TWA did provide them with direct subsistence in the form of meals, lodging, ground transportation, and health and accident insurance.[14]

At the beginning of the training program, each trainee was fitted for a TWA uniform. They were not, however, required to pay for that uniform until they began their "on line" duties after training. If they

[13] Although the Academy was primarily designed for the training of flight attendants, it has been used as an educational facility by such diverse organizations as the Department of Labor, the Department of Agriculture, and an accounting firm.

[14] It is stipulated that "[p]ersons attending TWA's flight attendant training program at the Breach Training Academy are provided without cost to them, among other things, room and board during the first four weeks of their training" and that "TWA furnishes persons attending its flight attendant training program at the Breech Training Academy with ground transportation by scheduled bus service, at no cost to them, as required by the training program and also for their personal desires or pleasure on weekends to areas for shopping and for church services."

failed to complete flight attendant training, trainees could return their uniforms and were not charged for them.

In the first week of training, the trainees were required to complete pay records and documentation so as to give the payroll department sufficient lead time in which to prepare the necessary paperwork prior to the first paycheck. The trainees were paid for their work following the fourth week of training and received the first paycheck after having been "on line" for two weeks. The union initiation fee was deducted from the first paycheck. Seniority for the purposes of such matters as furloughs, domicile bidding and layoffs was computed from the first day of training. However, seniority for the purpose of determining compensation was figured from the first day of "on line" service. The union did not represent trainees until they were "on line" and trainees were not obligated for union dues until then. Trainees were required to join the union within their first sixty days of service with TWA. A flight attendant remained on probation status for the first five months of service after graduation from the Academy.

[Flight Attendant Training]

The flight attendant training program at the Breech Training Academy spanned approximately four and one half weeks.[15] Trainees attended classes five days each week, eight hours each day, with an occasional Saturday field trip for evacuation training. During that period of time, the trainees received no training or instruction on flights carrying passengers; they replaced no "on line" TWA employees; they did not supplement the work of any "on line" employee; and they did not assist on any commercial flight. Slightly less than half of the training was devoted to instruction concerning the safety and emergency procedures training required by the reg-

[15] About 162 total hours of classroom instruction.

uiations of the Federal Aviation Administration (FAA) for passenger airlines.[16] That training specifically related to the procedures and equipment employed on the particular aircraft owned and operated by TWA.[17] In addition to the training required by the FAA, TWA trained its student flight attendants in a myriad of other subjects, including such things as aviation history and flight principles, personal grooming,[18] public and personal communications,[19] food and liquor preparation, foreign currencies, physical fitness, and personal finances.

[16] The TWA Manager of Flight Safety Training testified that TWA's approxed program requires 24 hours of instruction for domestic flights and an additional 7 hours of training for international or "over-water" operations. Apparently, TWA has offered more instructional hours in these subjects than required.

[17] Primarily, the Boeing 727, 747, 707 and the Lockheed 1011. Other domestic airlines operate different aircraft such as the European Airbus Industries A300B, the McDonnell-Douglas DC-10, the McDonnell-Douglas DC-8, and the Boeing 737. TWA has not provided training to its flight attendant trainees on these aircraft. The aircraft purchased by TWA are standard models of the manufacturer except they may have seat arrangements, galley equipment and locations, and some emergency equipment specified by TWA. Under federal regulations, each certified air carrier may prepare its own procedures for implementing the flight attendant training requirements of the FAA, subject to the approval of the agency. Each certified air carrier may select the emergency equipment installed in its aircraft from approved emergency equipment offered by different manufacturers. Similarly, each certified air carrier may select the type of first air situations for which it will give instruction to its flight attendant trainees, subject to the FAA requirement that such training cover the kinds of illnesses most frequently encountered in flight.

[18] TWA has presented its grooming course to such diverse non-industry groups as students at Rockhurst College and employees of the United Telecom Company.

[19] The communications course has incorporated sophisticated "behavioral skills" training. It has been presented to bank groups, hospital groups, rental car groups and other non-industry groups involved in "one-on-one" customer communications.

Although the training offered by TWA to its trainees at the Breech Training Academy was specifically geared to TWA passenger service and equipment, much of that training could be utilized in service on other airlines and in other fields of endeavor.[20] During the period in question, most major airlines, with some exceptions, required even experienced flight attendants to complete their own training courses before their "on line" duties commenced. That requirement was largely dictated by the training economics of the period.[21] But that fact does not demonstrate that the training acquired by TWA flight attendants is not transferable. To the contrary, the evidence at trial clearly established the transferability of the technical, FAA-required flight attendant training. Admittedly, the seat configuration and equipment of specific types and models of aircraft varies from airline to airline. But the variances between aircraft of the same type and model are slight. While all airlines do not utilize the same aircraft, there is a high degree of overlap in the models and types of aircraft

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[20] Similar flight attendant training was, and present is, offered by junior colleges, preparatory schools and community colleges. Because of the facilities owned by TWA, the "on line" experience of its instructors and the intensity of the instructional course, the quality of flight attendant training is superior at the Breech Training Academy than that offered by non-industry educators. The evidence at trial indicated that non-industry educators often drew heavily upon training materials used by TWA and American Airlines for their course preparation. Students are clearly willing to enroll in non-industry courses even though they will be retained by the major airlines before they can serve as flight attendants.

[21] During the period in question, a shortage of trained flight attendants existed in the industry. Thus, while TWA might have selected an experienced flight attendant for training, the economics involved made it less expensive to put that person through the full training course rather than tailor an individual course for that person. TWA's Manager for In-Flight Services testified that because a large number of trained flight attendants are now available, he contemplates hiring trained flight attendants and abbreviating the traditional training course, thus reducing training costs.

flown by the major airlines. Obviously, TWA does not train its flight attendants for service on aircraft which it does not own or operate, and is not required to do so. But it does train flight attendants for service on types and models of aircraft which are operated by many other airlines. And under FAA regulations, flight attendants can be qualified for service on those other airlines with marginal training, consisting of "differences" instruction by written bulletins or short instructional courses. For example, in one instance, furloughed TWA flight attendants were qualified for service with National Airlines based upon only five days training, including DC-9 and wet ditch training which they had not received at the Breech Training Academy. In many instances, TWA has leased aircraft from other airlines, including British Airways, Eastern Airlines and Northeast Airlines and has qualified its flight attendants with "differences" training by written bulletins and brief instructional courses at the various domiciles.

It was also established at trial that the non-technical training offered by TWA was highly transferable. Flight attendant witnesses testified that such training was readily transferable to service on other airlines, despite minor differences in "service flows"[22] and marketing techniques or strategies. And repeatedly, wit-

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[22] "Service flows" are simply the procedures employed in the delivery of food and beverages to the passengers. Basically, the essential services offered by the major airlines are the same. As one witness put it: To the layman, the differences between [two airlines] . . . amounts to on United you probably get macademia nuts; on TWA you get almonds. [O]n United they serve a sirloin, and we serve a chauteau briand. It looks the same. Its simply marketing. The concern of all airlines is to deliver service as quickly, cheaply and efficiently as possible. In that respect, most airlines arrive at the same solutions whether it be by imitation or by innovation. Thus, the "service flows" on a given type of aircraft are largely the same from airline to airline.

nesses testified that their training was applicable to endeavors other than careers as flight attendants.[23]

Conclusions of Law

Under the Fair Labor Standards Act, specifically Sections 206 and 207 of Title 29, U.S.C., an employer must pay minimum wages and overtime benefits to employees who are engaged in activities covered by the Act. The Act describes the employer-employee relationship in the broadest terms. An "employee" is "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ," as defined by the Act, means "to suffer or to permit to work." 29 U.S.C. § 203(g). Indeed, it has been said that "[t]he term 'employee' is used in the broadest sense ever . . . included in any one act. Donovan v. American Airlines, Inc., [95 LC P 34,258] 686 F.2d 267, 271 (5th Cir. 1982), quoting United States v. Rosenwasser, [9 LC P 51,190] 323 U.S. 360, 363 (1945); Dunlop v. Carriage Carpet Co., [80 LC P 33,465] 548 F.2d 139, 143 (6th Cir. 1977); and Shultz v. Hinojosa, [63 LC P 32,367] 432 F.2d 259, 264 (5th Cir. 1970). Through the years, the language of the Act has been interpreted to achieve its intended purposes, rather than to effect a rote application of its requirements based upon common law principles of employment law. See, e.g., Walling v. Portland Terminal Company, [12 LC P 51,236] 330 U.S. 148, 150-151 (1947); Rutherford Food Corporation v. McComb, [12 LC P 51,254] 331 U.S. 722 (1947); Weisel v. Singapore Joint Venture, Inc., [87 LC P 33,834] 602 F.2d 1185 (5th Cir. 1979); Mednick v. Albert Enterprises, Inc., [76 LC P 33,205] 508 F.2d 297, 299-300 (5th Cir. 1975). The Act is to be read against the "economic reality" of a given case. Goldberg v. Whitaker House Co-op, Inc.,

[23] Former flight attendants testified that they developed poise and confidence translatable to such diverse fields as education and sales.

[42 LC P 31,090] 366 U.S. 28, 33 (1961); Weisel v. Singapore Joint Venture, Inc., supra; Real v. Driscoll Strawberry Associates, Inc., [86 LC P 33,821] 603 F.2d 748, 754-755 (9th Cir. 1979).

In two cases, Walling v. Portland Terminal Company, supra, and Walling v. Nashville, Chattanooga & St. Louis Ry., [12 LC P 51,237] 330 U.S. 158 (1847), the Supreme Court examined the Fair Labor Standards Act in the context of apprentice training programs. Portland Terminal involved the training of prospective yead brakemen by a railroad company. Each trainee was required to complete an initial training course averaging seven or eight days in duration. They then were given on-the-job training by experienced brakemen, learning first by observation and later by performing actual work under close supervision. Trainees who successfully completed the training course became qualified brakemen available to the railroad. However, until they were called to fill vacancies, trainees did not replace regular employees in the railroad. After training, the trainee brakemen retroactively received a modest amount of compensation after their training period which did not meet the requirements of the Fair Labor Standards Act.

Despite the fact that trainees ultimately formed an immediately-available and qualified pool of brakemen, the Supreme Court held they were not "employees" under the Act. Because they "work[ed] for their own advantage on the premises of another," trainees were not "suffer[ed] or permitted to work," as that phrase is used in the Act. 330 U.S. at 152. They were not "employees" because the company received no "immediate advantage" from their efforts during training. 330 U.S. at 153. Comparing the trainees to students of a vocational school, the Court indicated that "[t]he Fair Labor Standards Act was not intended to penalize [the company] for providing, free of charge, the same kind of

instruction at a place and in a manner which would most greatly benefit the trainees." Id.

In Nashville, Chattanooga & St. Louis Ry., the Court reached the same result. There, the railroad had employed a training method called "cubbing" in which prospective railroad employees trained by accompanying a regular work crew and by performing the duties of a regular employee under his supervision. Upon demonstrating his proficiency at the end of training, the "cub" could then be called into service by the railroad when needed. "Cubs" were paid some compensation during the training course whether or not they successfully completed it. The training lasted several weeks. Even under those facts, the "cubs" were not "employees" under the Act.

[American Airlines Case]

The decisions in Portland Terminal and Nashville, Chattanooga & St. Louis Ry., are still viable precedent and have been followed in subsequent federal court decisions. See Ballou v. General Electric Company, [65 LC P 32,490] 433 F.2d 109 (1st Cir. 1970), cert. denied, [65 LC P 32,474] 401 U.S. 1009 (1971); Atkins v. General Motors Corporation, [93 LC P 34,179] 524 F. Supp. 307 (W.D. La. 1981); Bailey v. Pilots Association for the Bay & River Delaware, 406 F.Supp. 1302 (E.D. Pa. 1976). And recently, the principles of Portland Terminal and Nashville, Chattanooga & St. Louis Ry., have been applied to a modern flight attendant program nearly identical to that offered by TWA. In Donovan v. American Airlines, Inc., supra, the Fifth Circuit rejected the claim of the Secretary that American Airlines flight attendant trainees were "employees" entitled to the benefits of the Act. In American Airlines, the Court approved a balancing test which had been applied by the trial court based upon an analysis of "the relative benefits flowing to trainee and company during the training period." 686 F.2d at 271, quoting 514 F.Supp. 526, 533.

Under that test, the Court found, as had the trial court, that the balance of benefits tipped toward the flight attendant trainees rather than the company because (1) the company received no immediate economic benefit, but rather incurred only expense during the training course, (2) the trainees did not replace any regular airline employee or supplement their work, and (3) the skills acquired by trainees were, to a large degree, fungible and transferable. The fact that the flight attendant training was not an altruistic endeavor and was offered at company facilities did not change that conclusion.

[The airline's] schooling is but one step, albeit integral, in preparing novices for their jobs. Trainees make a sacrifice to attend school. But so do all who seek to learn a trade or profession. Centralized training is to [the airline's] advantage, but the airline has no duty to offer training at an inconvenient place. The training process is made more effective and less expensive by requiring full time attendance under [the airline's control and devoting it entirely to [the airline's own] policies. These factors do not, however, mean that trainees are working while receiving this instruction.

[M]any companies hire persons as employees and then pay them while they attend company schools. These employers are governed . . . by the demands of the market place and by their own specialized needs. The FLSA does not require [the airline] to follow this course. 686 F.2d at 272.

There is little to distinguish the present case from American Airlines. The training courses offered by both airlines covered almost identical subjects and employed similar teaching methods, using both "hands on" training in aircraft simulators and classroom instruction. Both courses were offered in similar campus-like facilities situated in a centralized location. The living and subsistence arrangements were nearly identical. Neither airline permitted trainees to work on regular commer-

cial flights to supplement the work of regular flight attendants until initial training was complete. Both airlines attempted to match the number of graduating trainees to their immediate need for flight attendants. In both instances, trainees acknowledged, in writing, that they were not employees of the airline until their successful completion of training. None of the trainees received compensation until after academy training was finished. Both airlines experienced a high graduation rate and offered jobs to an extremely high percentage of successful trainees. In all substantive respects, the two training operations were the same.

[Labor Secretary's Assertions]

The Secretary attempts to distinguish American Airlines on two grounds: first, he asserts, TWA, unlike American Airlines, assured its trainees a job upon graduation from the Breech Training Academy, and second, TWA trainees "received the responsibility and benefits of TWA's flight attendant union."

But neither of these assertions are supported by the evidence at trial. Although TWA enjoyed a high degree of success in placing graduating flight attendants into "on line" jobs, instances occurred in which it was required to place graduating trainees on furlough because positions simply were not open. Trainees were not contractually obligated to enter employment after graduation. Similarly, TWA did not obligate itself to offer employment to those trainees after graduation. More importantly, the fact that TWA was extremely accurate in its anticipation of flight attendant needs does not alter the basis relationship between trainee and company, nor the "economic reality" of that relationship. Clearly, during the first four weeks of training, TWA operated a school from which it derived no immediate benefit.

Moreover, the Secretary's assertion that trainees enjoyed union representation during the first four weeks

of training is simply factually incorrect. Under the collective bargaining agreement in force after August 1, 1978, the sixty-day period for joining the union was computed from the first day of training. But union dues and initiation fees were not paid until flight attendants went "on line." And no union representation was extended to flight attendants in discipline and grievance proceedings until they had joined the union and had completed their five-month probationary period.[24]

The conclusion that trainees are not "employees" under the Act is reinforced by the application of the criteria established by the Wage-Hour Administrator. In Section 10(b)(11) of the Wage and Hour Division Field Operations Handbook, the Administrator has identified six criteria for determining whether trainees are employees.[25] As explained in American Airlines, those criteria compel the conclusion that flight attendant trainees are not employees under the Act.

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[24] Similarly, the practice of TWA personnel to refer to trainees and probationary flight attendants as "new hires" is not significant. That term was primarily used to demote probationary flight attendants who had completed their initial training and gone "on line." And, as explained by TWA witnesses, it could have easily been interchanged with other terms commonly used for green recruits such as "freshman," "plebe," or "rookie."

[25] The criteria are:

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees;

(3) the trainees do not displace regular employees, but work under close observation;

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded.

(5) the trainees are not necessarily entitled to a job at the completion of the training period; and,

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

[T]he training is similar to that given at vocational schools: the training is for the benefit of the trainees; the trainees do not displace regular employees and work under close observation; the employer derives no immediate benefit from the training; the trainees are not necessarily entitled to a job at the conclusion of training; and the employer and the trainee understand that no wages will be paid for the training.

686 F.2d at 273. An application of those criteria in the context of this case mandates the same result.

Finally, the Secretary argues that TWA trainees should be considered employees because they follow "the usual path of an employee." However, a reading of the cases relied upon by the Secretary reveals that they do not involve training situations. Instead, they concern the application of the requirements of the Act to existing, productive relationships in which immediate benefit was conferred upon the employer. See Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947); Donovan v. Tehco, Inc., [91 LC P 34,007] 642 F.2d 141 (5th Cir. 1981); Tobin v. Anthony Williams, 196 F.2d 547 (8th Cir. 1952). The teaching of those cases does not change the result here.

For the reasons stated above, it is therefore

Ordered and Adjudged that judgment be entered in favor of defendant Trans World Airlines, Inc., and against plaintiff Donovan, and that the claims of plaintiff be dismissed with prejudice. Costs are to be assessed against plaintiff.

Supreme Court, U.S.
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No. 87-548

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief in opposition distorts and misstates the applicable law and the controlling facts.

Partly echoing the court below, on the crossover issue, Respondent says that "[t]he continued existence throughout the strike of [parts of] the collective bargaining agreement and [in particular] its union security clause were indeed relevant considerations forming a part of the basis for the Eighth Circuit's finding of discrimination." (Resp. 7)[1]

But whether the union security clause remained in effect during and after the strike is at issue in the prior case between the same parties in which this Court has granted certiorari. (No. 86-1650) The decision below, therefore, cannot be allowed to go unreviewed when the case which the Eighth Circuit regarded as its "most important[ ]" underpinning (7a) is itself under review by this Court.

Standing alone, moreover, on both the crossover and trainee issues, this case clearly presents the required independent and compelling reasons for review stated in the petition. The force of those reasons is undiminished by Respondent's misconceptions and misinterpretations of the law.

ARGUMENT

I. The Applicable Law Misconceived

1. Underlying Respondent's position is the unqualified premise that "economic strikers are entitled to reinstatement to their former jobs upon their unconditional offer to return to work." (Resp. 4) The "basic principle articulated by this Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967)" ("*Fleetwood Trailer*") (Resp. 4), however, is that upon their

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1 Respondent's brief in opposition to the petition is referred to as "Resp. _____." The petition is referred to as "Pet. _____"; and the appendices to the petition as "_____a."

unconditional offer to return to work, economic strikers are entitled to fill their former jobs, *if vacant*, or other *vacant* positions for which they are qualified. In *Fleetwood Trailer*, where many of the positions were filled during the strike by crossovers who remained in those jobs after the strike,[2] the Court held that a striker "is entitled to an offer of reinstatement" only "[i]f and when a job for which the striker is qualified becomes available. . . ." 389 U.S. at 381. It is the rule, not the "exception" (Resp. 4), that all "those who worked during the strike" may retain their jobs. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) (*"Erie Resistor"*).

2. Respondent's repeated emphasis (Resp. 5-7) on the word "replacement" to suggest that this Court did not intend it to include crossovers as well as new hires (*but see* Pet. 14) completely ignores the underlying rationale of the decisions in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (*"Mackay Radio"), Erie Resistor* and *Fleetwood Trailer*. The reason that an employer may retain " 'those who worked during the strike' " (Pet. 14) is to assure that the employer may exercise its right to operate during a strike; that reason applies to crossovers as well as to new hires. The Court that authorized the retention of new hires (with days or weeks of service) cannot have thought it "divisive" (Resp. 7) for an employer to retain crossovers (with years of service).

3. The third major faulty legal premise underlying both the decision below and Respondent's position is that strikers are entitled to be reinstated in seniority order. Neither the Eighth Circuit nor Respondent even attempts to explain the basis of this assumption. Whatever the status of the TWA-IFFA 1981-84 contract, the district court explicitly found that it "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (22a) Nor is there a back-to-work agree-

2 389 U.S. at 376; *see also* the Ninth Circuit's decision in *NLRB v. Fleetwood Trailer Co.*, 366 F.2d 126, 127 (9th Cir. 1966), where the court stated: "Approximately one-half of respondent's employees either did not go on strike, or crossed the picket lines to return to work within a few days."

ment giving the strikers that right. Absent some agreement giving the strikers a right to reinstatement in seniority order, they have no such right. *See Mackay Radio*, 304 U.S. at 347; *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1500-01 (6th Cir. 1987) (*"American Olean Tile"*); Pet. 17 and n.16.

4. Respondent, moreover, never explains how the postulated continued existence of the union security clause affects the right of the crossovers to keep their jobs. Nor does it explain how the alleged "discrimination" between the crossovers and full-term strikers[3] "is just as invidious and with the same long-term divisive effects as that which was condemned by this Court in *Erie Resistor*." (Resp. 7-8; footnote omitted)[4] In *Erie Resistor*, it was the promise of continued preference for the crossovers and replacements after the full-term strikers rejoined the active workforce, by filling vacancies, that this Court found so invidious and divisive. (*See* Pet. 27-28 and n.27) Here, on the other hand, as in *Mackay Radio*, the crossovers are not given any preference over reinstated full-term strikers.

3 Rather than discriminating, as noted at pages 1-2 above, TWA applied, and had to apply, the same general principle enunciated by this Court to both the crossovers and the full-term strikers: reinstatement, upon the economic striker's unconditional offer to return to work, if and when a job for which the striker is qualified becomes available. *See American Olean Tile*, 826 F.2d at 1501-02.

4 Purporting to explain why the new hires, all of whom would have less seniority than the full-term strikers, need not relinquish their jobs at the end of the strike, the Eighth Circuit stated that since the "[n]ew hires . . . were not union members when they began work during the strike," they "cannot be the subject of discrimination based upon union loyalty and activity." (7a n.4) To the extent the union security clause continued, however, the new hires were subject to it within 60 days of the start of their employment. Since more than 60 days passed between the time many of the new hires began their employment and the time the strike ended, there would have been no difference at the relevant time (*i.e.*, when the full-term strikers offered to return to work) between those new hires and the crossovers with respect to union membership or the compulsory payment of dues; neither would have to be union members (*see* Pet. 26-27 and n. 26), and both would have to pay union dues.

5. *Erie Resistor* does not establish the principle that an employer may not "implement any policy which would adversely affect employees' job security, job selection, or other benefits because of their participation in a strike" (Resp. 4), nor did TWA implement such a policy. *Erie Resistor* holds only that, *after reinstatement*, strikers cannot be disadvantaged *vis-a-vis* those who worked during the strike. It does not say anything about job security, in the sense that Respondent would have it here, that strikers are entitled to replace those permanent employees who worked during the strike.

6. Rather than not "material," as Respondent says (Resp. 2), the conflict, on the crossover issue, between the Eighth and Sixth and Seventh Circuits is of the essence. Respondent's statement about *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) (Resp. 10), ignores its holding about the rights of earlier returning crossovers as against more senior but later returning crossovers. In that case, an employee's place on the active seniority list determined whether he worked or not. The court held that crossovers reemployed in vacancies while the strike was on could not displace, on that list, new hires or other crossovers with less pre-strike seniority who had returned to work before them. *A fortiori*, full-term strikers would have no right to displace "junior" crossovers. Similarly, in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), not only all the members of the court but also the union's attorney agreed that it was lawful for the employer to reinstate crossovers during a strike in the chronological order in which they offered to return to work, and to retain them, regardless of seniority. And in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), "junior" crossovers retained their jobs as against the claims of more senior unreinstated strikers. (*See* Pet. 16-17.)

7. In holding that the flight attendants in training were not employees within the meaning of the Railway Labor Act, 45

U.S.C. §§ 151 *et seq.* ("RLA" or "the Act"),[5] the Eighth Circuit found "dispositive" the Seventh Circuit's decision with respect to the employment status of "the Group of 500" in *ALPA v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987) ("*United Air Lines*"). (10a-12a; Resp. 11) Respondent brushes aside the crucial factual differences between "the Group of 500" and the flight attendants in training by noting that the court below considered the differences "irrelevant" and then endorses the court's reliance on its consequent misreading of the Seventh Circuit's decision as a "sound and reasonable interpretation of [the] Act." (Resp. 11) The Seventh Circuit, however, simply did not hold that pilots in the same employment relationship to United as the flight attendant trainees here were to TWA (*see* Pet. 18 and n.17) were not "employees" under the RLA.

8. Although the National Mediation Board ("NMB"), the agency with primary jurisdiction to interpret and administer the RLA, has found that the differences which the Eighth Circuit held irrelevant were in fact determinative of employee status,[6] Respondent contends that NMB decisions in representation disputes cannot be relied on in determining who is an

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5 That novel theory was not briefed in either court below. Respondent did argue that the trainees were not *flight attendant* employees because they had not concluded the training necessary to be flight attendants (*but see* Pet. 19-20 and n.20); it never claimed that they were not employees at all. In fact, the parties stipulated that "[i]ndividuals who began training on and after March 10, 1986 at the TWTC *were hired as TWA employees* on their first day of training." (Stip. 21 at 60a; emphasis added.)

6 The NMB held that the trainees in *Air Micronesia*, 10 N.M.B. 11 (1982), who (like "the Group of 500") had never been on the payroll of the carrier, were not employees. *Air Micronesia* was relied on by the Seventh Circuit in *United Air Lines* in finding that "the Group of 500" were not employees. On the other hand, the NMB held that the trainees in *Scheduled Skyways*, 10 N.M.B. 488 (1983) (68a), who (like the flight attendants in training in the case at bar) were hired by the carrier and were on the carrier's payroll, were employees within the meaning of the RLA, even though they were still in ground school training at the time in question. *See also* Pet. 18 n.17 as to another group of 539 United Air Lines pilots, held to be permanent replacements and employees.

employee within the meaning of the RLA. (Resp. 12) The short (and dispositive) answer to that contention is that the definition of persons covered by the Act, found in Section 201 of the RLA, 45 U.S.C. § 181, upon which the court below relied, is equally binding on the NMB in determining whether an individual is an *employee* entitled to vote in a representation election. (*See* RLA § 2, Ninth, 45 U.S.C. § 152, Ninth.)[7] While the NMB may allow individuals who clearly were employees within the craft or class and who dispute any change in their status (*e.g.*, who claim they were improperly discharged) to vote, it has not authorized voting by an individual who was never an employee in the appropriate craft or class.

9. Respondent argues additionally that in the past "[t]rainees were never included within the bargaining unit nor covered by any of the collective bargaining agreement terms," and "were not even considered to be 'employees' as defined by the Fair Labor Standards Act" ("FLSA"). (Resp. 12; footnote omitted) But, like "the Group of 500" in *United Air Lines*, there was an explicit agreement between TWA and trainees in the past that they were not employees and they were not paid or otherwise accorded the terms and conditions of employees. In contrast, the flight attendant trainees at issue here were hired and paid and treated as employees. There can be no doubt that if the employees in *Donovan v. Trans World Airlines*, 97 Lab. Cas. (CCH) ¶ 34,385 (W.D. Mo. 1983) (Resp. 1a), had been told they were employees as of the day they started their training and were paid as employees, as were the

7 As the agency charged with "designat[ing] who may participate in [representation] election[s]" under the Act, 45 U.S.C. § 152, Ninth, the NMB's interpretation of the statutuory definition of "employee" is entitled to great deference. *See, e.g., United Air Lines*, 802 F.2d at 912 n.18; *Southern Railway v. Combs*, 484 F.2d 145 (6th Cir. 1973).

flight attendant trainees here, they would have been found to be employees within the meaning of the FLSA.[8]

10. Respondent argues that this Court applied a balancing test in *Mackay Radio* and that the Eighth Circuit's conclusion "that this balance tips in favor of IFFA's position" when applied to the situation of the trainees "is a rational application of the *Mackay* decision." (Resp. 13) But the balancing test in *Mackay Radio* was applied not to determine whether the employees there were entitled to be treated as permanent replacements, but to balance the competing claims of the right to strike and the right of the employer to operate. This Court struck that balance in *Mackay Radio* and no further case-by-case balancing is called for. *See* Pet. 24; *see also Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964) (footnotes omitted) ("The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, . . . state that an employer has a legal right to replace economic strikers at will").

11. Respondent does not even attempt to address the NLRA precedent, established by the NLRB and other Circuits, under which the trainees here would have been held to be permanent replacements. (*See* Pet. 19-21.) Two lines of decision under the NLRA put the Eighth Circuit in essential conflict, on the trainee issue, with the Second and Seventh Circuits, but Respondent chooses merely to endorse the Eighth Circuit's erroneous statement that "the NLRA case precedent supports the finding that the trainees had not acquired the status of permanent replacements at the time the strike ended." (Resp. 14)

8 The six criteria (listed at Resp. 17a n.25) for determining whether trainees are employees within the meaning of the FLSA are preceded in § 10b11(b) of the Wage and Hour Division Field Operations Handbook by the statement: "If *all* six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA" (emphasis added). It follows that since criteria 5 and 6 are not satisfied here, the flight attendants in training were employees.

II. The Controlling Facts Misstated

1. Respondent, echoing the Eighth Circuit, persists in the misstatement that TWA "awarded" the crossovers permanent replacement status. The crossovers, however, were permanent employees before the strike began. Those who exercised their right not to join the strike merely continued to work in their permanent positions. As to those who initially joined the strike, petitioner simply applied to them the same basic principle, enunciated by this Court, that it applied later to the full-term strikers: upon their unconditional offer to return to work, economic strikers are entitled to fill their former jobs, if vacant, or other vacant positions for which they are qualified.

2. Throughout its brief, Respondent argues as if all the flight attendant positions (except those filled by new hire permanent replacements) were vacant at the end of the strike and TWA then allocated those vacant positions among a pool consisting of all the pre-strike bargaining unit employees. (Resp. (i)) The reality, however, is that TWA neither reinstated the crossovers nor granted them preference at the end of the strike; TWA simply did not displace them from the positions they held when the strike ended.

3. Alternatively, Respondent says that the full-term strikers had been replaced not by the new hires, but by the crossovers, and that crossovers cannot be "permanent replacements." (Resp. 2) Immediately before the strike ended, however, the workforce consisted of the new hires and the crossovers. Since the crossovers were working with the new hires, obviously the new hires were not then replacing the crossovers. If they had previously replaced crossovers (who were not yet working) then, when the crossovers returned to work, *they* were filling "places left vacant by strikers" (*Mackay Radio*, 304 U.S. at 345), and even under the dubious doctrine of *International Ass'n of Machinists v. J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), they were permanent replacements, entitled to keep their jobs when the strike ended. In any event, when the full-term

strikers offered to return to work, the positions held by the crossovers were not vacant; they were already filled by *permanent* employees.

4. Respondent pejoratively and inaccurately refers to the crossovers as employees who "abandon[ed] a strike that they earlier began, . . . leapfrog[ging] over the backs of their fellow employees and fellow strikers. . . ." (Resp. 9) Employees, however, have a right to refrain from collective activity, and, contrary to Respondent's suggestion that the crossovers voted for this strike (Resp. 9), the record does not establish that IFFA allowed the flight attendants to vote on TWA's final offer before it called the strike. In fact, it is established by the trial transcript in *IFFA v. TWA*, No. 86-6030 (W.D. Mo.) that no such vote was taken. In any event, crossovers who abandon a strike do not assure themselves a job at the end of the strike "at the expense of the more senior full-term strikers" (Resp. 9); on the contrary, they prevent the filling of vacancies by new hires.

5. Respondent's statement that there was a "lack of any visible business need for TWA to place these trainees into working positions . . ." (Resp. 13) was not true at the time they were hired. TWA had to hire permanent replacements in time to meet its operating needs. The training of replacements took a minimum of seventeen days. TWA had no idea when the strike would end. It therefore had to hire the flight attendant trainees at issue as permanent replacements when it did, before May 17, 1986, so that they could fly as part of an FAA minimum crew when the peak season began around June 1. It could not wait until June 1 to hire the replacements and then begin their 17-day training. The Eighth Circuit's statement that TWA "established no business need to put trainees into working positions because all vacant positions could be filled with returning strikers" (14a) misstates the question with the benefit of hindsight. TWA exercised its right to give the new hire trainees assurance of permanent employment at the time they began their training—when the strike was still on-going and

TWA had no way of knowing when it would end—because that was the only way it could be confident that it would have the necessary complement of flight attendants 17 days later. At the conclusion of the strike, TWA merely honored the commitment it had earlier made to the flight attendants—a commitment that *Mackay Radio* says it had the right both to make *and to honor*.[9]

CONCLUSION

The Eighth Circuit's decision with respect both to the status of the crossovers (explicitly based "[m]ost importantly" (7a) on its prior decision now pending full review in this Court) and with respect to flight attendants in training (principally based on reliance on a recent inapplicable decision of the Seventh Circuit, not briefed in this case) distorts basic principles established by this Court, conflicts directly with decisions in other Circuits, contravenes National Mediation Board interpretation of the RLA, and departs from long standing precedent and practice regarding the rights of employees who exercise their right to refrain from concerted activity. The petition should therefore be granted, and the decision below on the two specified issues should be reversed.

Respectfully submitted,

Of Counsel

CAROLE O'BLENES
TOBY R. HYMAN

November 17, 1987

MURRAY GARTNER
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MICHAEL A. KATZ
Attorneys for Petitioner

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9 There is no issue of business justification because, as this Court said in *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983), "The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for his refusal to reinstate strikers." (citation omitted) No such issue, moreover, was before the court. (*See* Pet. 8 n.8)

MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 1, 1987
CERTIORARI GRANTED MARCH 21, 1988

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Excerpts from Exhibit 1 (1981-84 collective bargaining agreement between TWA and IFFA) A17

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Excerpt from Exhibit 15 (May 28, 1986 letter from J.W. Hoar to V.L. Frankovich) A94

Excerpts from Affidavit of William S. Borden, filed August 25, 1986 in the United States District Court for the Western District of Missouri, in Opposition to IFFA's Motion for Partial Summary Judgment and in Support of TWA's Cross-Motion for Partial Summary Judgment A95

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Exhibit B-13 (February 13, 1986 letter from W.S. Borden to all flight attendants, with attachment) A118

Exhibit B-15 (February 28, 1986 letter from W.S. Borden to all flight attendants, with excerpts from attachment) A123

Exhibit B-16 (March 1, 1986 letter from C. Icahn to all TWA employees, with attachment) A126

Exhibit B-20 (March 14, 1986 letter from C. Icahn to all flight attendants) A129

Exhibit B-22 (March 17, 1986 mailgram from C. Icahn to all flight attendants) A132

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Exhibit 1 to the Affidavit of J.W. Hoar, filed August 29, 1986, in the United States District Court for the Western District of Missouri, in Opposition to IFFA's Motion for Partial Summary Judgment and in Support of TWA's Cross-Motion (May 27, 1986 letter from V.L. Frankovich to J.W. Hoar) A147

Exhibit Y to the Affidavit of William S. Borden, filed September 17, 1986, in the United States District Court for the Western District of Missouri, in Support of TWA's Motion for Stay Pending Appeal (April 15, 1986 letter from V.L. Frankovich to flight attendants) A149

Affidavit of Vernon Laursen (with attachments), filed September 23, 1986, in the United States District Court for the Western District of Missouri, in Support of TWA's Motion to Vacate A152

Affidavit of Mary Pat Taylor, filed September 23,1986, in the United States District Court for the Western District of Missouri, in Support of TWA's Motion to Vacate A158

Notation Pursuant to Item 2(c)
of the Clerk's Memorandum Regarding Printing

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the printed Petition for Certiorari:

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Memorandum and Order of the United States District Court for the Western District of Missouri, dated September 9, 1986	18a
Order of the United States District Court for the Western District of Missouri, dated October 14, 1986, Granting Stay Pending Appeal	37a
Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, dated May 26, 1987	1a
Order of the United States Court of Appeals for the Eighth Circuit, dated August 31, 1987, Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*	16a
Order of the United States Court of Appeals for the Eighth Circuit, dated September 24, 1987, Granting Stay of Mandate Pending Certiorari Proceedings	17a

Relevant docket entries in the United States District Court for the Western District of Missouri

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

DATE	*NR*		*PROCEEDINGS*
1986			
May 30	01	COMPLAINT	—With JS44-c. 1 summons issued.
		* * *	
May 30	04	ORDER	—With Judge Sasch's consent, this matter is transferred to the Hon. Howard F. Sachs. JES, Jr. copies mailed.
		* * *	
Jun 24	06	FIRST	—Amended Complaint.
		* * *	
Jul 03	09	ORDER	—Plt's Mt. for leave to file corrected First Amended Complaint is GRANTED. HFS (# 7).
Jul 03	10	FIRST	—Amended Complaint.
Jul 07	11	ANSWER	—TWA. (To First Amended Complaint)
Jul 21	12	MOTION	—Plt. IFFA's Motion for Partial Summary Judgment.
Jul 21	13	SUGGESTIONS	—In support of Plt. IFFA's Motion for Partial Summary Judgment.
Jul 21	14	STIPULATIONS	—(joint).
		* * *	

DATE	*NR*		*PROCEEDINGS*
1986			
Aug. 12	16	CROSS-MOTION	—Def. TWA'S cross-motion for partial summary judgment.
		* * *	
Aug. 25	23	DEF	—TWA's supplemental sugg. in opp. to IFFA's motion for partial summary judgment and in support of TWA's cross-motion.
Aug. 25	24	BENCH STATEMENT	—(HFS)
Aug. 25	25	MINUTES	—Of Trial or Hearing. Argument on Cross Summary Judgment. Held in K.C., Mo. before the Hon. Howard F. Sachs. Jim Leacock Reporter, Mike Shipley, Law Clerk.
		* * *	
Aug. 29	27	CERTIFICATE	—Of filing and service. (Affidavit of J. W. Hoar, Vice Pres. of Industrial Relations TWA.)
		* * *	
Sep. 09	47	MEMORANDUM	—And Order. ORDERED that partial summary judgment be entered in favor of TWA on IFFA's claims in Count I for reinstatement of economic strikers displaced by crossovers and new hires who worked during the strike, and that partial summary judgment be entered in favor of IFFA on its claim for reinstatement of economic strikes displaced by trainees who did not have operating experience flights prior to May 20, 1986, and were

DATE	NR	PROCEEDINGS
1986		
		not assigned to active service as regular flight attendants on revenue flights prior to May 24, 1986.
		Economic strikers with enough seniority to have been reinstated if the 463 trainees had been displace instead of given positions in active service shall be reinstated within 30 days, absent a stay pending appeal. Back pay with interest, less interim earnings, shall be promptly paid such reinstates strikers. In all other respects, IFFA's claim for injunctive relief is DENIED. SO ORDERED.
		The court retains jurisdiction to modify or enforce this order. A motion for stay of relief granted pending appeal will be considered by this court, given the closeness of the legal questions and the considerable dislocation caused by this ruling if there is a reversal. HFS RR mailed copies from K.C.
Sep. 09	48 JUDGMENT	—In a civil case. Entered on Sept. 9, 1986. mailed.
		* * *
Sep. 09	51 SUGG.	—Plt. IFFA's second supplemental sugg. in support of its motion, and in opposition to

DATE	NR	PROCEEDINGS
1986		
		Def. TWA's Cross-Motion, for partial Summary Judgment. (Filed with Judge HFS approval.).
		* * *
Sep. 17	53 MOTION	—Def. TWA's motion for stay pending appeal. w/ sugg.
Sep. 17	54 AFFIDAVIT	—Of WILLIAM S. BORDEN. W/ Exhbit X & Y.
Sep. 17	55 NOTICE	—Of Appeal, by Def. TWA.
Sep. 19	56 MOTION	—Def. TWA's Motion to vacate, with sugg. & with affidavits of J. W.Hoar, Frank Bugler,
		* * *
Sep. 23	58 AFFIDAVIT	—Supplemental affidavit of Paul E. Donnelly, attachments.
Sep. 29	59 OPPOSITION	—Plt. IFFA's sugg. in opp. to Def. TWA's mt. to vacate.
Sep. 30	60 ORDER	—TWA'S motion to vacate is DENIED. HFS #56.
		* * *
Sep. 30	62 MOTION	—Of Def. TWA, Inc. to renew its previously filed motion for stay pending appeal and for entry of an order expediting the time in which IFFA shall respond to such renewed motion.
Sep. 30	63 SUGGESTIONS	—In support of Def. TWA motion to renew, etc.
Sep. 30	64 NOTICE	—Of Appeal by TWA. No filing fee. Rule 4(a)(4). Fed. R. App. P. copies mailed to 8th Circuit.

DATE	NR	PROCEEDINGS
1986		
Oct. 02	65 ORDER	—ORDERED that TWA shall, on or before Wed., Oct. 8, 1986, file and hand deliver to IFFA its response to IFFA'S Motion to Enfore Judgment in Case No. 86-6059-CV-SJ-6. ORDERED that IFFA shall, on or before Wed., Oct. 8, 1986, file and hand deliver to TWA its response to TWA'S Motion for Stay Pending Appeal in Case No. 86-6084-CV-SJ-6. ORDERED that counsel shall, at or before 12:00 noon on Thursd. Oct. 9, 1986, file a proposed scheduling order in Case No. 86-6030-CV-SJ-6. If counsel are unable to agree upon any matters, they should file a proposed order setting forth the extent of their agreement, and be prepared to discuss any remaining disputes with the court.
Oct. 02	65 CONTINUATION OF	—ORDER ORDERED that the conference previously scheduled for 2:30 p.m. on Fri. Oct. 3, 1986 is CANCELLED. The conference is rescheduled for 1:30 p.m. on Thurs. Oct. 9, 1986. HFS
Oct. 08	66 OPPOSITION	—Plt. IFFA's sugg. in opp. to Def. TWA's mt. to renew its previously filed mt. for stay pending appeal.

DATE	NR	PROCEEDINGS
1986		
Oct. 14	67 ORDER	—Granting Stay Pending Appeal. ORDERED that TWA'S obligation under the Sept. 9, 1986 ruling to offer reinstatement and back pay to certain senior flight attendants is STAYED pending appeal, subject to TWA's filing with the court an $8 million bond, approved by the court, within 10 (10) days of this order. HFS #53, 62, 63. Mailed 10-15-86.
Oct. 14	68 NOTICE	—of Appeal. By IFFA. R#31431, K.C., MO.

Relevant docket entries in the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-2197

DATE	*FILINGS—PROCEEDINGS*	
1986		
	• • •	
Sept. 24	DOCKETED appeal.	
" "	CERTIFIED copies of notice of appeal, docket entries and judgment dated September 9, 1986.	(1)
	• • •	
Oct 7	AMENDED notice of appeal	(3)
Oct. 14	MOTION of aplnt for expedited appeal. (to ct)	(4)
Oct. 16	ORDER: TWA's motion for an expedited appeal is granted and the Clerk is directed to place this case on the Court's calendar for arg. on Friday, Dec. 12, 1986 at 8:30 a.m. in St. Paul, MN. Each side shall be allotted 20 minutes for argument. The parties have informed the Clerk's office that IFFA has filed a cross-appeal The following cross-appeal briefing schedule is established: Aplnt/cr. aplee, TWA due 10/29/86, Aplee/cr.-aplnt IFFA's brief due 11/12/86, aplnt/cr.-aplee TWA reply brief due 12/1/86, aplee/cr. aplnt IFFA's reply brief due 12/10/86. Aplee/cr. aplnt IFFA reply brief shall be filed directly with the Clerk's office in St. Paul, MN. The parties are encouraged to use the appendix method for preparing the record on appeal. Extensions will not be granted. All briefs must be received in the Clerk's office on the date indicated. Service on opposing counsel shall be by hand-delivery or next-day air service.	(5)
	• • •	

DATE	*FILINGS—PROCEEDINGS*	
1986		
Oct. 29	BRIEF APPELLANT w/ser 7 copies w/2319	(8)
Oct. 29	APPELLANT ADDENDUM w/ser 7c copies w/2319	(9)
	• • •	
Nov. 12	BRIEF OF APPELLEE w/ser 7 copies w/2319 toCT.	(10)
Dec. 1	APPEARANCE for appellant.	(11)
Dec. 1	APPEARANCE for appellee.	(12)
Dec. 1	CONFORMED APPELLANT BRIEF w/ser 7 copies (to ct) w/2319	(13)
Dec. 1	APPELLANT/CROSS APPELLEE BRIEF w/ser 7 copies (toct) w/2319	(14)
Dec. 3	CONFORMED BRIEF OF APPELLEE w/ser 7 copies (to ct) w/2319	(15)
Nov. 26	JOINT APPENDIX	
Dec. 10	CROSS - APPELLANT's REPLY BRIEF w/scr 12/9 to Ct. w/2319	(16)
DEC 12	ARGUED AND SUBMITTED IN ST. PAUL to Judges Lay, Bright and Wollman. Murray Gartner, counsel for appellant. John P. Hurley, counsel for appellee. Rebuttal by Mr. Gartner. RECORDED.	
1987		
May 26	OPINION BY BRIGHT, PUBLISHED w/2319 819 F.2d 839 (1987)	(17)
May 26	JUDGMENT: The district court's order granting employment preference to the new hires and denying such preference to the trainees is affirmed. It is further adjudged and decreed that the district court's judgment concerning the cross-overs is reversed and that unreinstated strikers are entitled to displace cross-over employees with lesser seniority.	

DATE	*FILINGS—PROCEEDINGS*
1987	
	This cause is hereby remanded to the district court and the district court is directed to modify its judgment consistent with this opinion. TWA is directed to pay one-half the Union's costs in pursuing its cross appeal as well as one-half of the Union's costs incurred in defending TWA's appeal. w/2319 (18)
June 5	APPELLANT/CROSS-APPELLEE'S petition for rehearing with suggestion for rehearing en banc. w/2319 w/service (19)
June 5	APPLICATION AND suggestions of "Crossover" Flight Attendants for leave to intervene and file brief in support of appellant's motion for rehearing en banc. w/2319 w/service (20)
June 5	INTERVENOR'S BRIEF in support of appellant's petition for rehearing en banc. w/2319 w/service RECEIVED
June 12	APPELLEE-CROSS/APPELLANT'S IFFA'S response in opposition to "Crossovers' " application for leave to intervene. w/2319 w/service. (21)
June 18	OPINION CORRECTION, page 10, paragraph 2, lines 14, 15 and 16-citation
June 29	APPELLEE/CROSS-Appellant's response to petition for rehearing and suggestion for rehearing en banc. w/2319 w/service (22)
	• • •
July 24	AMICI CURIAE BRIEF OF "Crossover" flight attendants in support of appellant's motion for rehearing en banc. w/2319 w/ser (24)

DATE	*FILINGS—PROCEEDINGS*
1987	
July 27	AMENDED ORDER: This Court's order of July 24, 1987 is hereby amended. The "Crossover" Flight attendants are not granted leave to intervene in this appeal; they are, however, allowed to file a brief as amici curiae. The Clerk will file the previously tendered brief as an amici curiae brief in support of rehearing en banc. w/2319. (25)
Aug 31	ORDER: APPELLANT/Cross-Appellee's petition for rehearing en banc has been considered by the Court and is denied. Judges John R. Gibson, Fagg and Bowman would have granted the petitions. Judges Ross and Magill did not participate. Petition for rehearing by panel is also denied. w/2319 (26)
Sep 4	APPELLANT/CROSS-Appellee's motion for stay of mandate pending certiorari proceedings. w/2319 (27)
Sep 16	OPPOSITION OF IFFA to appellant/cross-appellee's motion for stay of mandate pending certiorari proceedings. w/2319 (28)
Sep 21	REPLY STATEMENT of Trans World Airlines, Inc. in support of its motion for stay of mandate pending application to the Supreme Court for a writ of certiorari. w/2319 w/service (29)
Sep 24	ORDER: THE motion of appellant/cross-appellee for stay of mandate is granted, and the mandate of this Court is hereby stayed to and including October 8, 1987, pending certiorari proceedings. w/2319 (30)
Oct. 5	RECD phone call fm. Sup.Ct. that case was docketed in Sup.Ct. as no. 87-548 on 10-1-87 w/2319

DATE	*FILINGS—PROCEEDINGS*
1987	
Oct. 20	NOTICE OF FILING of pet.for writ of cert. to the Sup.Ct. of the U.S. as case no. 87-548 dated 10-1-87 w/2319 (31)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-2319WM

DATE	*FILINGS—PROCEEDINGS*
1986	
Oct 17	DOCKETED CROSS APPEAL
" "	Certified copies notice of cross appeal, docket entries and judgment of 9/9/86 from District Court (1)
	* * *
Oct. 29	APPELLANT ADDENDUM w/ser 7 copies w/2197
Oct. 29	BRIEF OF APPELLANT w/ser 7 copies w/2197
	* * *
Nov. 12	BRIEF OF APPELLEE w/ser 7 copies w/2197 (to ct)
Dec. 1	CONFORMED APPELLANT BRIEF w/ser 7 copies w/2197 (to ct)
Dec. 1	APPELLANT/CROSS APPELLEE BRIEF w/ser 7 copies w/2197 (to ct)
Dec. 3	CONFORMED BRIEF OF APPELLEE w/ser 7 copies w/2197 (to ct)
Dec. 10	CROSS-APPELLANT'S REPLY BRIEF w/ser 12/9 to Ct w/86-2197
DEC 12	ARGUED AND SUBMITTED IN ST. PAUL to Judges Lay, Bright and Wollman. Murray Gartner, counsel for appellant. John P. Hurley, counsel for appellee. Rebuttal by Mr. Gartner. RECORDED.
1987	
Feb. 19	DISTRICT court order of 2/17/87 denying motion for relief from order and judgment (5)
Feb. 19	DEFENDANT TWA's motion for relief from order and judgment; suggestions in support and plain-

DATE	FILINGS—PROCEEDINGS
1987	
	tiff's suggestions in opposition filed in District Court (6)
May 26	OPINION BY BRIGHT, PUBLISHED w/2197 819 F.2d 839(1987)
May 26	JUDGMENT: The district court's order granting employment preference to the new hires and denying such preference to the trainees is affirmed. It is further adjudged and decreed that the district court's judgment concerning the cross-overs is reversed and that unreinstated strikers are entitled to displace cross-over employees with lesser seniority. This cause is hereby remanded to the district court and the district court is directed to modify its judgment consistent with this opinion. TWA is directed to pay one-half the Union's costs in pursuing its cross-appeal as well as one-half of the Union's costs incurred in defending TWA's appeal. w/2197
June 5	APPELLANT/CROSS-APPELLEE'S petition for rehearing with suggestion for rehearing en banc. w/2197 w/service
June 5	INTERVENOR'S BRIEF in support of appellant's petition for rehearing en banc. w/2197 w/service RECEIVED
June 8	MOTION OF the Chamber of Commerce of the United States for leave to file brief amicus curiae in support of Trans World Airlines' petition for rehearing with suggestion for rehearing en banc. w/service (7)
June 8	BRIEF AMICUS Curiae of the Chamber of Commerce of the United States in support of Trans World Airlines' petition for rehearing and suggestions for rehearing en banc. w/service

DATE	FILINGS—PROCEEDINGS
1987	
June 12	APPELLEE/CROSS-APPELLANT'S IFFA'S response in opposition to "Crossovers' " application for leave to intervene. w/2197 w/ser
June 18	OPINION CORRECTION, page 10, paragraph 2, lines 14, 15 and 16-citation
June 22	ORDER: THE motion of the Chamber of Commerce of the United States for leave to file an amicus brief in support of Trans World Airlines' petition for rehearing is granted. (8)
June 29	APPELLEE/CROSS-Appellant's response to petition for rehearing and suggestion for rehearing en banc. w/2197 w/service
July 27	ORDER: AMENDED ORDER: This Court's order of July 24, 1987 is hereby amended. The "Crossover" Flight attendants are not granted leave to intervene in this appeal; they are, however, allowed to file a brief as amici curiae. The Clerk will file the previously tendered brief as an amici curiae brief in support of rehearing en banc. w/2197.

**Notation Pursuant to Item 2(c)
of the Clerk's Memorandum Regarding Printing**

The following pleadings and stipulations, filed in the United States District Court for the Western District of Missouri, have been omitted in printing this joint appendix because they appear at the following pages in the appendices to the printed Petition for Certiorari:

	PAGE
IFFA's Corrected First Amended Complaint, filed July 3, 1986	47a
Stipulations, filed July 21, 1986	57a
Plaintiff IFFA's Motion for Partial Summary Judgment, filed July 21, 1986	64a
Defendant TWA's Cross-Motion for Partial Summary Judgment, filed August 12, 1986	66a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-6

Exhibits to Stipulations, filed July 21, 1986:

Excerpts from Exhibit 1 (1981-84 collective bargaining agreement between TWA and IFFA)

AGREEMENT

between

TRANS WORLD AIRLINES, INC.

and the

FLIGHT ATTENDANTS

in the service of

TRANS WORLD AIRLINES, INC.

as represented by

THE INDEPENDENT FEDERATION

OF FLIGHT ATTENDANTS

This agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between TRANS WORLD AIRLINES, INC., hereinafter called the "Company" and the Airline Flight Attendants in the service of Trans World Airlines, Inc., as represented by the INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, hereinafter called the "Union."

It is hereby mutually agreed

ARTICLE 1

RECOGNITION

In accordance with the certification (R-4687) made by the National Mediation Board on April 1, 1977, the Company hereby recognizes the Independent Federation of Flight Attendants (IFFA), as the duly designated and authorized representative of the Flight Attendants in the employ of the Company for the purposes of the Railway Labor Act, as amended.

SCOPE

All TWA flights flown by the Company which require Flight Attendants on board the aircraft shall be operated in accordance with the provisions of the current Working Agreement, and all Flight Attendants employed by the Company shall be subject to the provisions of the current Working Agreement.

ARTICLE 2

DEFINITIONS

As used in this Agreement, the term

(A) "Cabin Attendant" means an employee whose work shall include performing and assisting in the performance of all enroute cabin services and ground service to delayed or cancelled passengers in a resourceful and gracious manner, and the responsibility to apply these services for the welfare, comfort, enjoyment, and safety of passengers. A Cabin Attendant may be required to attend operational meetings, refresher training courses, equipment checkouts, ditching drills, and similar procedures related to flight duties. A Cabin Attendant may, from time to time, be requested to participate in publicity and promotional assignments.

(B) "Flight Purser" means an employee who provides or assists in providing service to passengers while in flight, and whose work includes performing and assisting in performing all enroute cabin service, attending to passenger comfort, responsibility for the preparation and completion of passenger, crew, and cargo manifests enroute, and other reports as required by the Company or by law. When two (2) or more cabin attendants are assigned to an international flight on which international cabin attendants under this Agreement are utilized, at least one (1) of these shall be a Flight Purser who will be designated as being in charge of cabin service. A Flight Purser may be designated to perform necessary duties in connection with a flight cargo operation and may be required to attend operational meetings, refresher training courses, equipment checkouts, ditching drills, and similar procedures related to flight duties. A Flight Purser may, from time to time, be requested to participate in publicity and promotional assignments.

(C) "Service Manager" means an employee who exercises jurisdiction and direct control over all cabin attendants in matters concerning all phases of their duties and responsibilities as set forth by Company procedures. The work of a Service Manager shall include, but not be limited to the assignment, direction and reassignment where necessary of the work of the cabin crew complement. When two (2) or more Cabin Attendants are assigned to a wide-bodied aircraft, at least one (1) of them shall be a Service Manager. A Service Manager will be familiar with all cabin attendant duties, be capable of performing all such duties and will perform such duties at the direction of the Company or whenever the requirements of the service justify. A Service Manager is responsible for developing, maintaining and furthering a harmonious team spirit among the cabin attendants. A Service Manager may be designated to perform necessary duties in connection with a flight cargo operation and may be required to attend operational meetings, refresher training courses, equipment checkouts, ditching drills, and similar procedures related to flight duties. A Service Manager may, from time to time, be requested to participate in publicity and promotional assignments. When a Service Manager and a Flight Purser,

as defined in 2(B) and (C) above, are assigned to the same flight, the Service Manager shall be designated as being in charge.

(D) "Employee" as used herein means Cabin Attendant, Flight Purser, or Service Manager. Flight Attendant as used herein shall be synonymous with Employee.

(E) "Block-to-Block" time shall mean that period of time beginning when an aircraft first moves from the ramp blocks, for the purpose of flight, and ending when the aircraft comes to a stop at the ramp blocks at the next point of landing.

(F) "Base Station" means a location where Flight Attendants are permanently based.

(G) "Month" or "calendar month" as used in this Agreement shall mean the following inclusive periods:

January	30 days	1-30 January
February	30 days	January 31-March 1 (leap year 31 days)
March	30 days	2-31 March
April	31 days	April 1-May 1
May	30 days	2-31 May
June	31 days	June 1-July 1
July	30 days	July 2-July 31
August	30 days	1-30 August
September	31 days	August 31-September 30
October	30 days	1-30 October
November	31 days	October 31-November 30
December	31 days	1-31 December

(H) (1) "A Domestic flight" is any flight which operates within the contiguous forty-eight (48) states and Washington, D.C.

(2) "An International flight" is any flight which either departs or arrives at a station outside the contiguous forty-eight (48) states and Washington, D.C.

(I) "Operational Duty Hours" start with the time an employee is required to report for active flight duty, or does report for such duty, whichever is later, and end one-quarter hour for Domestic and one hour for International after the conclusion of block time at a station where a cabin attendant is released, or if the flight does not depart, operational duty hours end when the employee is released from such flight. Block-to-block and deadhead time are not included in operational duty hours. If an employee is released from duty at an intermediate station, operational duty hours shall end at time of release and shall recommence when the employee reports, or is required to report, whichever is later, for continuation of flight duty.

The Company may waive a Flight Attendant's report time at a layover station in a non-routine situation, to no less than fifteen (15) minutes, in which case, operational duty hours shall not be less than the originally scheduled operational duty hours, it being understood that such payment will not affect a commencement of an on-duty period or trip hours as defined in 6-A(D)(1) and 6-B(E)(1).

(J) Standby Duty

(1) A domestic reserve Flight Attendant shall be considered to be on "residence standby" if she/he is informed that she/he must stand by the telephone in order to be available for immediate flight duty on other than her/his assigned flight. Those reserve Flight Attendants assigned to residence standby must be available to report for flight duty within two (2) hours via surface transportation of being assigned to a flight.

(2) A domestic reserve Flight Attendant shall be considered to be on "airport standby" if she/he is informed that she/he must standby, in uniform, at the airport in order to be available for immediate flight duty on other than her/his assigned flight.

(3) An international reserve Flight Attendant shall be considered to be on "standby duty" if she/he is informed

that she/he is assigned to "standby duty" and that she/he must stand by the telephone in order to be available for immediate flight duty on other than her/his assigned flight. Those international reserve Flight Attendants assigned to standby duty must be available to report for flight duty within two (2) hours via surface transportation of being assigned to a flight. There shall be no airport standby for international reserve Flight Attendants.

(K) A "wide-bodied aircraft" is defined as an aircraft configuration with two or more aisles.

(L) An employee who is assigned to a "ferryflight" shall be considered as deadheading.

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ARTICLE 9

VACATIONS

(A) Employees based in the continental United States will be eligible for vacation according to the number of full months in the employ of the Company in the preceding calendar year, computed according to the following schedule:

Calendar Days to Be Allowed for Vacation According to Number of Years of Service with the Company Completed Prior to January 1 of Year Vacation is Due to Be Taken

Months Worked Prior to January 1	4 Years or Less	5 Through 7 Years	8 Through 24 Years	25 Years and over
1	1	2	3	4
2	2	4	5	8
3	3	5	8	11
4	5	7	10	15
5	6	9	13	18
6	7	11	15	22

Months Worked Prior to January 1	4 Years or Less	5 Through 7 Years	8 Through 24 Years	25 Years and over
7	9	13	18	26
8	10	15	20	30
9	11	17	23	34
10	12	19	25	37
11	13	21	28	41
12	15	23	30	45

(B) In addition to vacation pay and credit provided under Articles 6-A(E) or 6-B(F) and (G), an employee shall receive increment pay based upon the number of credited vacation pay hours times the following applicable rate:

Domestic Flight Attendants & Service Managers..... $0.30
International Flight Attendants..... $0.22
Pursers & International Service Managers..... $0.98

(C) An employee will become eligible for a vacation on January 1 of each year, provided he/she has completed the probationary period or six (6) months with the Company, whichever is less. A schedule of available vacation periods for the succeeding year shall be posted by the Company by October 1 each year, however, the Company may commence the January vacation bid period on January 2 in order to insure flight protection for the preceding day. Employees shall bid and be awarded a vacation period on the basis of their domicile as of October 1. Preference of periods in which employees shall be permitted to take vacations shall be granted at each station in order of seniority, (including employees on a leave of absence) taking into consideration the requirements of the service. Employees shall file written preferences as to the period(s) for taking vacation, such preferences to be in the hands of the Company by November 15 each year. Vacation assignments shall be posted by the Company on or before December 1 and will remain posted through December 31. When vacation schedules have been established, senior employees will

not be permitted to take the vacation period already assigned to junior employees. An employee's scheduled vacation period for the succeeding year shall not be changed because of a change in base station.

(D) Not less than three percent (3%) of the vacations posted in accordance with paragraph (C) above shall be scheduled in any calendar month. Further, no less than one and one-half percent (1 1/2%) of such vacation periods shall be scheduled in either the first or second half of any bid month. Vacation periods may be traded between employees at the same domicile provided such trades are effected prior to the fifteenth (15th) of the month preceding the first vacation period involved.

(E) Vacations shall not be cumulative and must be taken within the calendar year. When a vacation period has been scheduled it will not be changed without the employee's consent, except upon thirty (30) days written notice, unless the Company does not have sufficient employees to maintain schedules and, in no event, without fifteen (15) days written notice, except with the employee's consent. However, in the event Company operations in any year do not permit any employee his regular vacation during such year, he shall be so notified in writing by the Company and he may be permitted to take such vacation in the succeeding year. When an employee is not granted a vacation, due to the operation of this paragraph, for a previous year of service, such employee shall be granted vacation pay for such vacation earned and not received.

(F) Vacation allowance will be granted to terminating employees in accordance with the following rules:

(1) Employees terminating because of layoff due to reduction in force or resigning after giving two weeks' written notice of such resignation shall be granted vacation pay for the period worked during the current calendar year in accordance with schedules set forth in this Article, and shall also be paid for vacation period due from a previous year and not taken.

Pay under this paragraph is to be computed on the basis of 2:48 pay for each day of accrued vacation, times the employee's base hourly rate. In addition the employee will receive increment pay calculated under paragraph (C) above.

(2) Employees terminating because of lay-off due to reduction in force, who received vacation allowance at the time of lay-off and who were recalled during the same calendar year, will after the start of the next calendar year, receive a vacation leave for the period served from the date of recall to the end of that calendar year. When a Flight Attendant is granted a personal leave of absence, accrued vacation credits will be retained unless the Flight Attendant has an outstanding indebtedness to the Company or requests to receive vacation pay.

(3) Employees terminating because of resignation without giving two week's written notice of such resignation or terminating because of discharge will not be eligible for vacation allowance except for a vacation due from a previous year and not yet received.

(4) In the case of the death of an employee, the vacation pay due shall be paid to his executor, administrator, or legal heir.

(5) An employee shall not be eligible to receive vacation pay until he or she has completed the probationary period or six (6) months of service with the Company, whichever is less.

(G) Vacation allowance will accrue during each calendar month for which an employee receives pay from the Company, whether she or he is working or is on sick leave or vacation, however, an employee loaned to another Company will not receive less vacation as a result of such loan than he would have received if he had spent such loan time with this Company. For the purpose of computing vacation accrual, any number of days off duty on leave or fur-

lough over 15 shall count as a whole month, and any number up to and including 15 shall not be deducted from vacation accrual.

(H) When an employee based in the United States is to be transferred to an overseas domicile, every effort will be made to extend the date of transfer for a sufficient period to enable him to take all accumulated vacation to date prior to departing for his overseas domicile.

(I) During any calendar month that an employee is on vacation, his flight time for the period not on vacation during such month shall, on a pro rata basis, not exceed the normal flight time except as provided in 18-A(D)(7)(b)2(c), and when a vacation period extends from one month into the next month, the same conditions shall apply to such two months.

(J) A vacation period in excess of fifteen (15) days may be taken in two (2) segments, one of which shall consist of at least fourteen (14) consecutive days. Requests for such split vacations shall be submitted at the time vacations are bid and shall be awarded in seniority order at the same time that initial vacation awards are granted. The initial vacation award shall not be moved or changed as a result of an employee being awarded a split vacation. An employee may specify the minimum and the maximum number of days which he/she is willing to accept as a split vacation award and may be granted any number within that range. The provisions of the first sentence of paragraph (K) of this Article shall apply only to the longer segment of any vacation period split in accordance with this paragraph.

(K) An employee's vacation will not start until he or she has had at least twenty-four (24) hours free from all duty after return to domicile after his or her last flight. The Company shall not require an employee to be available at any time during the course of his or her vacation for any purpose.

Employees holding a line of flying shall contact crew schedule as of midnight of the expiration of their vacation or twenty-four (24) hours prior to the scheduled departure time of their first bid trip following their vacation period, whichever is later.

ARTICLE 10

SENIORITY GENERAL

(A) Seniority shall begin to accrue from the date of employment as a Flight Attendant and shall continue to accrue during such period of employment as a Flight Attendant except as otherwise provided in this Agreement. When Flight Attendants have equal seniority, their relative seniority shall be determined on the basis of their length of employment with the Company, or if the length of their Company employment is equal then their surname shall be listed in order of age as determined by date of birth as shown in the Company's personnel records (the oldest of them being listed first, the next oldest second, etc.). As to those Flight Attendants who are assigned to the line on or after July 1, 1976, if the length of Company employment is equal as between two Flight Attendants, then their surname shall be listed upon the seniority list on the basis of the last four (4) digits of the Flight Attendants social security number, with the Flight Attendant with the lowest last four (4) digits being deemed the senior.

(B) Seniority shall govern all employees in case of furlough due to reduction in forces, re-employment after furlough, (subject to Article 12(G)) choice of vacancies, and preference of assignment to equipment, provided the employee is deemed sufficiently qualified by the Company for the operation involved, except that the term "sufficiently qualified" as used herein shall be applied the same as it was on July 31, 1969. In addition, qualifications or lack thereof on any equipment will not be used as a basis for denying seniority in cases of bidding or reduction in force. If a Flight Attendant bids and is awarded a line of time on

equipment on which such Flight Attendant is not qualified, the provisions of Articles 6-A(F) or 6- B(G) will apply during such training. In the event a senior employee is not considered sufficiently qualified, the Company will, upon request, discuss the matter with the employee and furnish reasons therefor, in writing.

(C) Any employee given special assignment, or Ambassador Club Hostess assignment, and any employee lent to a subsidiary, affiliate, or other company, shall retain and continue to accrue seniority and shall have the option to return to coverage under this Agreement.

Employees accepting (a) promotion to supervisory positions, or (b) promotion to positions with duties directly associated with functions performed by employees covered by this Agreement, will retain and continue to accrue seniority in the classification from which promoted for a period of one (1) year following promotion. At the expiration of the one (1) year period, employees in promoted positions shall retain but shall no longer accrue seniority.

(D) Employees authorized by the Company to transfer from the In-Flight Services Department to another department within the Company at their own request will retain, for six (6) months after the date of transfer, seniority accrued to the date of transfer, and thereafter they shall lose all Flight Attendant seniority and their names will be removed from the seniority list(s).

(E) Seniority shall not in any respect govern transfers or assignment to non-flying duty, supervisory duty, or special assignment duty.

(F) Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

(G) Flight Attendants shall be on probation during their first five (5) months of service with the Company as a Flight Attendant under this Agreement. The provisions of paragraph (B) above as pertains to preference of assignment to equipment shall not apply to an employee until completion of the probationary period. Flight Attendants' names will appear on the Flight Attendant seniority list regardless of probationary status. Nothing in this Agreement shall be construed to prevent the Company from releasing a Flight Attendant during the probationary period regardless of her or his position on the system seniority list.

If a probationary Flight Attendant, starting from the date the Flight Attendant is assigned to the line, is absent sixteen (16) or more days during a thirty (30) day increment period, the Flight Attendant will be required to serve an additional thirty (30) day period, except that when Flight Attendants are furloughed during the probationary period due to a reduction in force, such Flight Attendants shall be required to serve only that time which when added to their prior time will comply within the five (5) month period specified above.

(H) Upon return from a position described in paragraph (C) above, an employee shall be permitted to return to the classification and domicile held prior to such assignment or may exercise system seniority on an existing vacancy in the classification held prior to such assignment provided the employee is qualified to perform the work of the job. An employee who is displaced by such exercise of seniority may in turn exercise displacement rights within the classification, seniority permitting or into a lower classification, seniority permitting. If the domicile of an employee is changed through the exercise of seniority rights, the Company will provide space available transportation over the Company's lines to the extent permitted by law and by Company regulations, but all other expenses incidental thereto shall be borne by the employee.

ARTICLE 11

SENIORITY LISTS

(A) The Company shall post a Flight Attendant System Seniority List containing the names of all Flight Attendants indicating classification and operation on a bulletin board at all stations where Flight Attendants are based. In addition, the Company shall post a domicile seniority list by classification and operation on bulletin boards at all stations wherein that classification of Flight Attendant is based.

(B) Within ten (10) days after January 1 and July 1 of each year, a revised seniority list shall be posted, said list to be up-to-date as of January 1 and July 1. Copies of said list will be provided to the Union.

(C) Each employee entitled to be listed on the list referred to in (A) above shall be permitted a period of forty-five (45) days after posting of such list in which to protest in writing to the company any omission or incorrect posting affecting his or her seniority. In the event such employee does not file a written protest within forty-five (45) days after the list is posted, he or she shall not thereafter be entitled to file such protest. Such protests directed to any revision of the original list shall be strictly confined to errors or changes occurring subsequent to the posting of the previous seniority list, except that typographical or clerical errors may be corrected at any time.

(D) In the event Trans World Airlines, Inc., purchases, absorbs, or merges with another airline, the Flight Attendant System Seniority Lists of Trans World Airlines, Inc., and of the company being purchased, absorbed, or merged with shall, at the time of such purchase, absorption, or merger, be determined by agreement between the representatives of the respective employee groups involved.

ARTICLE 12

REDUCTION IN FORCE AND RECALL

(A) When Flight Attendants are to be furloughed due to a reduction in force, at least fifteen (15) days notice of such reduction will be given the Flight Attendant to be laid off, except that such notice will not be required in instances wherein a temporary reduction is occasioned by strikes or other work stoppages, grounding of a substantial number of the Company's aircraft, or other circumstances beyond the Company's control.

(B) In those instances requiring notification in (A) above, the Company will, prior to giving such notification, post a bulletin in all domiciles indicating the anticipated number of Flight Attendants to be furloughed by domicile and will offer an equivalent number of leaves of absence at those domiciles where the reduction will occur. The actual number and duration of such leaves to be granted at each domicile will be determined by the Company.

When Flight Attendants are furloughed due to a reduction in force the Flight Attendants with the least system seniority in the job classification at the domiciles where the reduction occurs will be given furlough notice as specified in (A) above. At the time of issuing said furlough notice, the Company will post a bulletin in all domiciles containing the following information:

1. Names of those Flight Attendants receiving furlough notices.
2. Locations where vacancies exist by classification.
3. The names, location and classification wherein the least senior Flight Attendants who are subject to displacement are based.

(The information required to be posted in accordance with the provisions of paragraph (B) 3 above, will not be required when no further displacements will occur.)

Flight Attendants who have been issued furlough notice shall, within seven (7) days of such notice being issued,

send a telegram to the Company specifying their desire to accept the furlough or indicating those locations and classifications into which they will accept a transfer or displacement, in order of their preference. Telegram notifications shall be addressed to the Director, In-Flight Services Budgets And Controls, 605 Third Avenue, New York, New York 10158. Once having indicated their preferences for filling vacancies, displacement or furlough, Flight Attendants will not be permitted to refuse the award of said option. Exercise of displacement rights shall be as specified below and the Flight Attendant may only displace another Flight Attendant with less system seniority at a location specified in the above mentioned bulletin.

(1) When all telegram preferences have been received from Flight Attendants who have been issued furlough notice the Company shall award vacancies or displacement in system seniority order.

(2) Flight Attendants who are furloughed due to a reduction in force or who have been displaced may elect any of the options set forth below for his/her respective classification:

INTERNATIONAL SERVICE MANAGER:

1. Bid any International Service Manager vacancy on the system.
2. Displace the most junior International Service Manager on the system.
3. Displace the most junior Purser at the same domicile.
4. Displace the most junior Purser on the system.
5. Displace the most junior International Cabin Attendant at the same domicile.
6. Displace the most junior International Cabin Attendant on the system.
7. Displace the most junior Domestic Cabin Attendant at the same location.

8. Displace the most junior Domestic Cabin Attendant on the system.
9. Furlough.

DOMESTIC SERVICE MANAGER:

1. Bid any Domestic Service Manager vacancy on the system.
2. Displace the most junior Domestic Service Manager on the system.
3. Displace the most junior Domestic Cabin Attendant at the same domicile.
4. Displace the most junior Domestic Cabin Attendant on the system.
5. Furlough.

FLIGHT PURSER:

1. Bid any Purser vacancy on the system.
2. Displace the most junior Purser on the System.
3. Displace the most junior International Cabin Attendant at the same domicile.
4. Displace the most junior International Cabin Attendant on the system.
5. Displace the most junior Domestic Cabin Attendant at the same location.
6. Displace the most junior Domestic Cabin Attendant on the system.
7. Furlough.

INTERNATIONAL CABIN ATTENDANTS:

1. Bid any Cabin Attendant vacancy on the system.
2. Displace the most junior International Cabin Attendant on the system.
3. Displace the most junior Domestic Cabin Attendant at the same location.
4. Displace the most junior Domestic Cabin Attendant on the system.
5. Furlough.

DOMESTIC CABIN ATTENDANTS:

1. Bid any Cabin Attendant vacancy on the system.
2. Displace the most junior Cabin Attendant on the system.
3. Furlough.

(C) Changes in base station as a result of exercising displacement options shall be without expense to the Company but non-positive air transportation on the Company's system shall be furnished to the extent permitted by law and in accordance with Company regulations. Flight Attendants who are displacing will exercise their system seniority in the Flight Attendant position for purposes of vacation, rates of pay, sick leave and bidding provisions of this agreement.

(D) An employee who has been furloughed due to a reduction in force shall file his/her address with the Company's Industrial Relations Department and thereafter shall promptly advise the Company of any change in address.

(E) An employee on furlough shall not be entitled to preference in re-employment and his/her name shall be removed from the seniority list if he/she does not comply with the requirement of paragraph (D) of this Article, or if he/she does not notify the Company in writing or by telegraphing of his/her intention to return to the service within fifteen (15) days of sending notice offering re-employment; or if he/she does not return to the service of the Company on or before the date specified in the notice offering such re-employment.

(F) Employees furloughed due to a reduction in force on return to duty within five (5) years from the furlough date, shall be allowed, for seniority purposes but not for purposes of determining future pay rate, all time accrued prior to returning to duty. At the end of five (5) years after the date of furlough, the furlough shall expire and the employee's name shall be removed from the seniority list(s).

(G) Flight Attendants who have been furloughed or displaced or who have displaced into a lower classification will be recalled in seniority order to the classification from which furloughed or displaced prior to the processing of all other bids on file. Furloughed Flight Attendants shall, upon notice of recall, indicate in order of preference those domiciles to which they will accept assignment. Assignments to domiciles will then be made in seniority order from among those Flight Attendants being recalled and those Flight Attendants who have standing bids on file. The priority of recall to the classification(s) will apply only to the first available vacancy offered in the classification(s) to the furloughed or displaced employee.

(H) A Flight Attendant who's furloughed due to reduction in force shall receive furlough pay as provided in paragraph (K) of this Article, subject to the limitations and conditions set forth therein.

(I) A Flight Attendant will not be eligible for or receive furlough pay if any of the following conditions exist:

(1) The Flight Attendant has not completed at least one (1) year with the Company, on pay status in a position covered by this Agreement. For the purpose of this paragraph "pay status" includes all time spent in a position covered by the Agreement, exclusive of leaves of absence or furlough.

(2) The Flight Attendant remains in the employ of the Company in any position.

(3) The Flight Attendant fails to exercise his/her seniority which would enable the Flight Attendant to remain in the employ of the Company, except where such exercise of seniority would require moving to a new geographic location.

(4) The Flight Attendant is dismissed for cause, resigns, retires, or accepts personal time off.

(5) The Flight Attendant has been furloughed as a result of a temporary reduction occasioned by strikes or other work stoppages, grounding of a substantial number of the Company's aircraft other circumstances beyond the Company's control, or a seasonal schedule reduction of less than four (4) months duration.

(J) An employee recalled to work under the terms of this Article after being on furlough for more than four (4) months who is again furloughed under conditions that would entitle him/her to furlough pay, shall be entitled to the amount specified for his/her service with the Company in accordance with paragraph (K) of this Article, less the dollar amount received on the occasion of the previous furlough, provided, that such dollar amount deduction shall not be made if such employee completes at least one additional year of active service with the Company under this Agreement from the date on which he/she reported for duty upon the occasion of the prior recall.

(K) The amount of furlough pay under this paragraph shall be based on the length of active service with the Company as above defined in paragraph (I). It shall be computed on the Flight Attendant's base pay at the time of furlough as follows:

Years of Service	Benefit
1 Year	2 Weeks
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11	11
12	12

(L) When the requirements of the International Operations are to be reduced due to seasonal fluctuations, each employee affected thereby shall receive at least two (2) weeks' written notice of such reduction.

ARTICLE 13

FILLING OF VACANCIES

(A) Flight Attendants who desire to transfer to a different base station or classifications may file a permanent bid in writing with the Company, stating the station(s) and/or classification(s) (listing them in order of preference, if more than one) to which they desire to transfer. However, employees will not be permitted to transfer until the completion of their probationary period. All bids must be filed with the Director—In-Flight Services, Budgets and Controls, 605 Third Avenue, New York, New York 10158. When vacancies occur in positions expected to last ninety (90) days or longer, the employees having the most system seniority, subject to the provisions of Article 12(G), who are qualified to perform the job and who have bids on file, will be offered an opportunity to transfer and fill the vacancy. Any employee transferring to fill such vacancy shall be available to begin the assignment on the date set by the Company, which shall be not less than seven (7) days from the date notified of the assignment. An employee shall be allowed a reasonable period between the time he/she is relieved of duties and the time required to report at the new location. Such time shall be established in advance and shall be dependent upon the means of travel. Before a bid is accepted for International Operations, a Flight Attendant must s ıow proof of ability to secure a passport within a thirty (30) day period.

(B) If no bids are on file at the time the vacancy occurs, special bids may be requested for filling the vacancy. If no qualified employee expresses a desire to transfer, the vacancy may be filled by assigning the most junior qualified employee to the position, or, in the Company's discretion, by

hiring a new employee. When special bids are requested, the bulletin will state the numbers of vacancies to be filled, the base station of each vacancy, and a reasonable deadline date after which bids will not be considered, which date will not be less than ten (10) days after the date the bulletin is posted. Bids under this paragraph must be made by telegram addressed to the appropriate Company official named in (A) of this Article.

(C) Employees involuntarily assigned pursuant to paragraph (B) above shall have prior rights to displacement in lieu of the most junior employees at the station where the displacement occurs. Such employee shall have the prerogative of returning to the base station from which the involuntary assignment was made.

(D) The Company will, at least once each month, post a list of all standing (permanent) bids for all classifications at all domiciles where Flight Attendants are based. If a Flight Attendant fails to withdraw a standing (permanent) bid prior to the bid being awarded, the Flight Attendant will not be permitted to refuse the award, except in cases due to a hardship.

(E) Vacancies expected to continue ninety (90) days or less will be considered as temporary vacancies. Employees may file a bid for temporary vacancy on the permanent bid form described in paragraph (A) above. Such temporary vacancies expected to be more than fifteen (15) days will be bulletined and such bulletin will state the number of vacancies to be filled at each base station. If sufficient bids for temporary vacancies are not received, the Company will assign the most junior qualified employee at the nearest station having an excess where the vacancy exists. Likewise, in case of temporary vacancies of less than fifteen (15) days, the Company will assign the most junior qualified employee at the nearest station where the vacancies exist. Only in an emergency will a Flight Attendant be assigned from the International Division to the Domestic Division (or the reverse) and then only in inverse order of seniority.

When such assignments are made between divisions, the Company will notify the President, IFFA, in writing of such assignments. Such notification shall include the number of Flight Attendants involved, the domicile to and from which assigned, the expected duration and the reasons therefor. Employees assigned temporary vacancies will be allowed an expense allowance of $25.00 per day in addition to the expenses under Articles 4(A)(1), 4(A)(2), 4(A)(3)(b), 4(B)(1)(c), and 4(B)(1)(f) as appropriate. In addition, the Company will provide suitable lodging for a Flight Attendant on temporary assignment at the temporary domicile. In the event the Company fails to provide suitable lodging, the Flight Attendant will be allowed the actual/reasonable expenses for the necessary lodging. Single trip assignments involving a change in geographic location will be considered temporary assignments for purposes of this Paragraph 13(E); however, the trip formula under Articles 6-A(D) or 6-B(E) will be calculated as if the Flight Attendant was based at the temporary domicile. Employees, in lieu of receiving an expense allowance of $25.00 per day may elect to receive a pass (Class 6, Non-Positive). In making requests for International operation employees to fill temporary vacancies in bases outside the United States, the Company will request the most senior employee who is available and qualified for the position taking into consideration any preference which has been filed with the Company and first considering any requests for extensions from employees then holding such assignments.

(F) Successful bidders shall pay their own moving expenses to their new station, except that the Company shall furnish Flight Attendants and members of the employee's immediate family who are residing with, and dependent upon the employee, non-positive transportation on the Company's system to the extent permitted by law and in accordance with Company regulations.

(G) The bidding procedures set out herein shall apply with the following exceptions; In the event the Company determines that there is an excess number of Flight Pursers at any International Operations station and that a vacancy or vacancies exists at another International Operations station but the system Flight Purser requirements remain unchanged, bids submitted by qualified Flight Pursers at the station at which such excess exists shall, regardless of the seniority of other bidders, have first preference in filling such vacancy or vacancies. In selecting between qualified Flight Pursers based at the station where the excess exists, system seniority will govern. In the event the Flight Pursers at the station at which such excess exists fail to bid in sufficient numbers to fill the vacancy or vacancies, the most junior Flight Purser at such station who is qualified shall be assigned by the Company to such vacancy or vacancies. The Company may reject any bid from any Flight Purser based on International Operations if such employee has not been based at his current station (including any preceding overseas domicile at which he may have been involuntarily displaced) for a period of at least thirty (30) months. In filling positions at stations outside the United States expected to last ninety (90) days or longer, the employees having the most system seniority, who are qualified to perform the job and who have bids on file, will be offered an opportunity to transfer and fill the vacancy.

(H) Future vacancies within the Flight Purser category will be filled in the following descending order:

1. By bids from displaced or furloughed Pursers.
2. By bids from qualified Flight Attendants in seniority order.
3 By hiring new qualified employees.

(I) Names of successful bidders will be posted at each domicile where employees in the status concerned are based.

The transfer of the Flight Attendant from International to Domestic operation or the reverse which will be handled as follows:

1. INTERNATIONAL TO DOMESTIC

(a) Base Pay Computation

Base pay shall be computed by multiplying the number of days assigned to the International operation times the applicable daily base rate and paid at the appropriate International rate. The remaining days shall be paid at the applicable Domestic rate computed in the same manner.

$$\frac{\text{Monthly Base Rate Times Twelve (12) (Months in a Year)}}{\text{Three Hundred Sixty-Five (365) (Days in a Year)}} = \text{Daily Rate}$$

(b) Incentive Pay Computation

(1) All flight pay credit not associated with flight credit accrued during that month as of the date of transfer shall not be carried forward but shall be paid to the Flight Attendant as specified in Article 18 at the applicable International incentive rate.

(2) Incentive pay other than those hours specified in paragraph (1) above shall be computed as follows:

Example: Flight Attendant transferring from International to Domestic on the sixteenth (16) of the month:
$15 \times 2.1 = 31.5$
Flight pay hours in 15 days = 45
$45 - 31.5 = 13.5$

We would then pay 13.5 hours at the applicable incentive rate or the difference between 45 and 31.5.

(c) Hours Limitation

The hours limitation for the month in which the Flight Attendant transfers shall be seventy-five (75) hours except as otherwise provided for in Domestic Article 18-A(D)(7).

(d) Rest Provisions

The provisions in Articles 6-B(T) and 14(B)(3) will be used to determine the appropriate rest required prior to reporting for flight duty.

2. DOMESTIC TO INTERNATIONAL

(a) Base Pay Computation

Base pay shall be computed by multiplying the number of days assigned to Domestic by the applicable daily rate of Domestic base pay and paid at the appropriate Domestic rate. The remaining days shall be paid at the applicable International rate computed in the same manner.

$$\frac{\text{Monthly Base Rate Times Twelve (12) (Months in a Year)}}{\text{Three Hundred Sixty-Five (365) (Days in a Year)}} = \text{Daily Rate}$$

(b) Incentive Pay Computation

All excess credit hours carried forward from the previous month as specified in Article 18-A shall not be carried forward but shall be paid to the Flight Attendant at the applicable Domestic incentive rate. For limitation purposes the above-mentioned hours shall be considered and the Flight Attendant's maximum quarterly limitation for scheduling purposes shall be reduced accordingly.

Example: Flight Attendant transferring from Domestic to International on the sixteenth (16) of the month:
$15 \times 2.1 = 31.5$

Flight pay hours in 15 days = 45
45 - 31.5 = 13.5

(c) Hours Limitation

The hours limitation shall be the standard 235.5/255 quarterly limitation including the excess credit hours brought forward as specified above.

(d) Rest Provisions

Rest provisions of Articles 6-A(R) and (S) and 14(B)(3) shall be used to determine the rest required prior to reporting for flight duty.

(J) The Company will pay a penalty of twenty-five dollars ($25.00) to a Flight Attendant for each flight assignment in which he/she is upgraded to a Purser or Service Manager classification. The upgraded Flight Attendant will receive the higher rate of pay.

* * *

ARTICLE 18-A

SCHEDULING OF DOMESTIC FLIGHT ATTENDANTS

* * *

(D) Domestic Domicile Scheduling Policy

(1) Purpose

To establish a policy outlining the methods to be used to schedule Flight Attendants out of their respective base stations.

(2) General

(a) Whenever a change of flight times, stops, layover points occurs on the domicile flight assignments, or if flights are added or deleted after the closing of bid preference period, the decision regarding posting of new preference sheets shall be made by the General Manager, In-Flight Services of the respective base station after consulting with the local

scheduling representative(s). Such decision is to be made on the basis of the extent of such changes and the time of the month.

At the time the bid package is distributed to all Flight Attendants at the domicile it shall contain a cover letter, all commercial flights which can be sequenced, the number of relief runs as required and reserve sequences.

1) The following information shall be included in the pairings:

   a) Flight number
   b) Equipment
   c) Departure Time
   d) Crew Change Station
   e) Scheduled Stops
   f) Arrival Time
   g) Layover Station and Time
   h) Total Trip Hours
   i) Total Scheduled Block-To-Block
   j) Deadhead in a flight pairing
   k) Total round-trip credit/pay
   l) Pairing number

2) In construction of bid lines the following information shall be included, as appropriate in the bid lines or reserve schedules:

   a) Orginating flight number or in the case of deadhead, it will show deadhead and the first operating flight.
   b) The number of required Flight Attendants per line.
   c) Total credit and total pay per flight and per line.
   d) Bid line sequence number.
   e) Reserve spreads/prescheduled duty free days.
   f) Day and date of departure and return to domicile.
   g) Type(s) of equipment.

3) The cover letter shall contain the following information:

   a) Dates of Bid duration.
   b) Domicile.
   c) Times of reserve call-in periods and an example.
   d) Closing time and date of submission of Flight Attendant option form as specified in (7)(f).

(3) Prepartion of Bid Runs

(a) The scheduling of Flight Attendants out of each base station shall be in accordance with seniority and the provisions of the Agreement. Since all situations cannot be covered, any question of interpretation should be brought to the attention of the General Manager, In-Flight Services of the respective base station. If such interpretation is not satisfactory to the Flight Attendant involved, he/she shall nevertheless follow instructions received from the General Manager, In-Flight Services of the respective base station without prejudice to the Flight Attendant's rights under Article 16 of the Agreement.

(b) In each category at each base station, bid runs shall be posted and bid in accordance with this Article. The minimum number of relief runs anticipated shall be indicated in the bid package. Relief bids will be constructed after completion of initial balancing and shall be construed to be bid runs.

(c) Concurrently with posting and bidding of bid runs, as provided in (b) above, reserve spreads shall be posted and bid. These reserve run selections shall be posted in such a manner as to reflect the date of the projected reserve spread for each Flight Attendant awarded a reserve run selection. The minimum anticipated number of reserve spreads to be granted shall be shown on the bid sheet. A Flight Attendant may bid and be assigned a bid run or re-

serve spread in the Flight Attendant's category. Flight Attendant categories for the purpose of this provision are Service Manager and Cabin Attendant. Each Flight Attendant in each such category who does not hold a bid run shall hold a reserve spread.

(4) Flight Attendant Assignment and Bidding

Bid packages shall be distributed no later than the twelfth (12th) day of each month. Flight Attendants will be allowed a minimum of eight (8) days, information permitting, to express their preferences. Closing date of the bids as indicated on the cover letter of the bid package shall be no earlier than the twentieth (20th) of the month.

The date and time of the closing of bids as indicated on the cover letter shall be final and binding in all instances.

The System Scheduling meeting as specified in paragraph 18-A(B) above shall be conducted as early in the month as possible, but in no event later than the sixteenth (16th) day of the month.

(a) Each Flight Attendant should indicate a minimum of six (6) choices on the preference sheet regardless of seniority. Such choices should include at least two (2) separate flight assignments. Reserve Flight Attendants desirous of being moved up to a pattern of open flights that can be developed into a line of time subsequent to the initial balance and prior to the 7th day of the month should indicate "open time" prior to their preferences for reserve run selections.

The letter "O" should be indicated in the appropriate block on the bid preference sheet.

(b) Each run selection shall be numbered and lettered. Run selections may be made singularly or in series.

For series bidding, the run numbers must be side by side with a dash in the position column in between.

Example:

Series Bid: 999Z - A bid in ascending run order for all runs and available positions; 110-115Z - A bid in ascending run order for all inclusive runs and available positions; 140-137C - A bid in descending run order for all inclusive runs and positions.

Position: "A" signifies a bid for the senior Cabin Attendant position, "B" signifies that either "A" or "B" is acceptable, "C" signifies that either "A", "B" or "C" is acceptable, etc. "Z" in the position column always means a bid for all available positions.

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NOTE: The "A", "B" and "C" in no way relate to the position or duties Flight Attendants will assume on the airplane.

(c) Each Flight Attendant shall complete the line provided on the bid preference sheet to indicate his/her preference of flights for balances and relief bid purposes. Such preference must be identified by flight numbers.

A Flight Attendant bidding for a relief run may express his/her relief run preferences and balance preferences as outlined below by listing the appropriate letter code on line seventeen (17) of the bid sheet. To the extent possible preferences will be awarded in the order listed.

A - Specific time off

B - Weekends off

C - Commercial flights

D - Charter Flights

E - Commercial and charter flights combination

F - Long flights

G - Short flights

H - Long and short flights combination

A Flight Attendant may indicate in the appropriate box on the monthly bid preference sheet his/her request to use excess credit carried forward from the previous month (bow-wave), if she/he has a sufficient amount, to avoid initial balancing. Use of bow-wave for this purpose shall not result in make up base pay.

(d) It will be the responsibility of each Flight Attendant to ensure that his/her preference sheet is deposited in the locked box or receptacle provided for that purpose by the time and date of the closing of bid preferences. Nonreceipt of a bid preference sheet will be handled in accordance with paragraph (5)(d) below.

(e) When two Cabin Attendants desire to fly together during a bid period, the senior of the two shall not bid. The senior Cabin Attendant must only list the name and payroll number of the Cabin Attendant with whom he/she wishes to fly on the bid sheet. The junior Cabin Attendant must list all the bids and must also write the name and payroll number of the Cabin Attendant with whom he/she wishes to fly. If the junior Cabin Attendant fails to write the name and payroll number of the senior Cabin Attendant, the senior Cabin Attendant shall be handled in accordance with paragraph (5)(d) below.

NOTE: If a senior Cabin Attendant enters any bid preferences the request for partner preference is negated.

(f) Flight Attendants who are absent from their base station by reason of vacation, illness, personal time

off, leaves of absence or irregular flight operations during the period preferences are posted for bid shall be responsible for having their preferences submitted to the Crew Schedule Department. Valid excuses will not be limited to the above. Under unusual circumstances permission may be obtained from the General Manager - In-Flight Services to bid by telegram.

The bid preferences must be received by the Crew Schedule Department prior to the time and date of the close of bid preferences. If the above bid preferences are submitted by either telegram or certified U.S. Mail the Company will not be responsible for the nonreceipt of any bid preferences submitted in accordance with the above.

(g) All domiciles shall forward to all other domiciles (including International domiciles) their bid packages as soon as they are distributed. These bid packages will be available in the domicile crew scheduling offices in order to provide information to Flight Attendants transferring per paragraphs (5)(e) and (f) below.

(5) Awarding Of Run Selections

(a) Run selections shall be awarded in accordance with seniority and posted. Every effort shall be made to post the run selection awards within forty-eight (48) hours after the time and date of the closing of bid preferences.

Flight Attendants may call Crew Schedule during specified hours for bid results. Those specified hours will be indicated on the cover letter of the bid package.

If the bid results are not posted forty-eight (48) hours prior to the beginning of the new bid period, Flight Attendants may call Crew Schedule other

than the specified times indicated on the cover letter for results.

At each domicile for each classification, copies of the alphabetical listing of monthly bid awards will be available for use by Flight Attendants.

(b) Pursuant to paragraph (4)(e) above, when awarding bids, the senior Cabin Attendant will be by-passed until the junior Cabin Attendant with whom he/she wishes to fly is reached. If there is only one open position on a flight, neither Cabin Attendant will be awarded it since they requested to fly together.

(c) Flight Attendants who will be unavailable for an entire period will be by-passed in the awarding of bids. In the event a Flight Attendant returns to duty during the month, he/she will be given a sequence of open flights or a reserve schedule. However, those Flight Attendants who are expected to be on personal illness for thirty (30) days or more during a bid period will be awarded a bid run, seniority permitting, for the purpose of trips missed for sick leave. Effective with the implementation of the trips missed concept for jury duty, industrial injury and vacation, Flight Attendants who will be unavailable for an entire bid period as a result of such status may, seniority permitting, be awarded a bid run for the sole purpose of establishing trips missed credit.

(d) If a Flight Attendant fails to bid or submits insufficient bids, his/her assignment, after all other awards have been made, shall be in seniority order and in the following order: A run selection, relief run selection, a pattern of open flights or reserve. However, in any month in which it is necessary to rebid due to schedule changes, a Service Manager or Cabin Attendant who was absent from his/her base station during the period in which bid preference sheets were posted for bid shall be awarded a bid in accordance with his/her original bid for the month.

NOTE: If the run selection originally bid by such Service Manager or Cabin Attendant has been eliminated because of the scheduled change, and a rebid occurs as specified above he/she would revert to his/her next choice, etc.

(e) A Flight Attendant who is scheduled to transfer to another base station or who will resign during a bid period shall be entitled to bid at his/her present base station, only if he/she will be available at his/her present base station for a minimum of fifteen (15) days during such bid period; otherwise, he/she will be assigned to a pattern of open flights or to reserve.

(f) If a Flight Attendant's request for transfer to a new base station is awarded prior to or during the period bid preference sheets are posted at his/her new base station and he/she will be available for a minimum of fifteen (15) days during the subsequent bid period, such Flight Attendant may file a bid by either hand-delivered telegram or certified U.S. mail, addressed to the Manager - Flight Attendant Utilization. Such bid must be received by the Manager - Flight Attendant Utilization prior to the closing of bids at that station. In the event such a bid is not received, the Flight Attendant will be assigned to a bid line, relief line, open time line or reserve whichever is available. Under extenuating circumstances, such as short notice of transfer or emergencies, his/her supervisor may, on occasion, accept telephone bids from the transferee.

(g) Run selections shall not be traded.

(h) Run selections not covered by bid shall be assigned in order of seniority.

(i) Flight assignments which form a complete relief run selection will normally be constructed by the first day of the bid period but in no case later than 0001 of the seventh (7th) day of such bid period. In no case will be relief run holder be considered a reserve during any part of the bid period.

(j) If, subsequent to the initial balancing, but prior to the 7th day of the month, there is open time that can be developed into additional Flight Attendant lines of time, such lines will be subject to the provisions of paragraph (5)(i) above, and may be awarded in seniority order, in their respective categories, amongst the following: Insufficient bidders, transferees or Flight Attendants holding a reserve run selection who have indicated a preference for Open Time.

(k) Subject to reserve availability, Flight Attendants who bid or are assigned a reserve run selection in any bid period they are scheduled for vacation, may have their reserve spread attached to their vacation provided they specifically state in writing to the Flight Attendant Crew Planner.

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ARTICLE 18-B

SCHEDULING OF INTERNATIONAL FLIGHT ATTENDANTS

• • •

(D) International Domicile Scheduling Policy

(1) Purpose

To establish a policy outlining the methods to be used to schedule Flight Attendants out of their respective base stations.

(2) General

(a) Whenever a change of flight times, stops, layover points occurs on the domicile flight assignments, or if flights are added or deleted after the closing of bid preference period, the decision regarding posting of new preference sheets shall be made by the General Manager, In-Flight Services of the respective base station after consulting with the local scheduling representative(s). Such decision is to be made on the basis of the extent of such changes and the time of the month.

At the time the bid package is distributed to all Flight Attendants at the domicile it shall contain a cover letter, all commercial flights which can be sequenced, the number of relief runs as required and reserve sequences.

1) The following information shall be included in the pairings:

a) Flight number
b) Equipment
c) Departure Time
d) Crew Change Station
e) Scheduled Stops
f) Arrival Time
g) Layover Station and Time
h) Total Trip Hours
i) Total Scheduled Block-To-Block
j) Deadhead in a flight pairing
k) Total round-trip credit/pay
l) Pairing number

2) In construction of bid lines the following information shall be included, as appropriate in the bid lines or reserve schedules:

a) Originating flight number or in the case of deadhead, it will show deadhead and the first operating flight.

b) The number of required Flight Attendants per line.
c) Total credit and total pay per flight and per line.
d) Bid line sequence number.
e) Day and date of departure.
f) Layover Destination.
g) Type(s) of equipment.

NOTE: 747/707 pay comparison as specified in Letter of Agreement V will be provided for informational, but not for limitation, purposes.

3) The cover letter shall contain the following information:

a) Date of Bid duration.
b) Domicile.
c) Times of reserve set up periods and an example.

(b) The scheduling of Flight Attendants out of each base station shall be in accordance with seniority and the provisions of the Agreement. Since all situations cannot be covered, any question of interpretation should be brought to the attention of the General Manager, In-Flight Services of the respective base station. If such interpretation is not satisfactory to the Flight Attendant involved, he/she shall nevertheless follow instructions received from the General Manager, In-Flight Services of the respective base station without prejudice to the Flight Attendant's rights under Article 16 of the Agreement.

(c) In each category at each base station, bid runs shall be posted and bid in accordance with this Article. The minimum number of relief runs anticipated shall be indicated in the bid package. Relief bids will be constructed after completion of any

required balancing and shall be construed to be bid runs.

(d) A Flight Attendant may bid and be assigned a bid run or reserve schedule in the Flight Attendant's category. Flight Attendant categories for the purpose of this provision are Service Manager, Purser and Cabin Attendant. Each Flight Attendant in each category who does not hold a bid run shall hold a reserve schedule.

(e) The thirty-nine (39) hour legal rest provision as specified in Letter of Agreement IX shall not apply to reserves.

(3) Preparation of Run Selections

Prior to consulting with the Domicile Schedule representative(s) the General Manager In-Flight Services of the respective base station shall analyze the commercial flight assignments and develop them into bid runs.

(a) Domicile bid runs shall include all known commercial flight time assigned to that domicile which can be sequenced and developed so as to use, to the extent possible, all of a Flight Attendant's allowable quarterly hours as set forth in this Agreement. Nothing in this paragraph or in (7)(b) below shall require the Company to post for bid sequences that yield less than sixty-five (65) pay hours. As a result of this paragraph, the parties recognize that there may be sequences constructed in excess of ninety (90) hours.

(b) Consistent with this Agreement, flight assignments on International will be developed and posted for bid on a one month basis. To the extent possible, each bid package shall be developed so as to consist of single flight assignments.

(c) Relief run selections will be established and posted as required to protect open flight time, except that relief run selections will not be posted for those Flight Attendants who are scheduled to be unavailable for an entire bid period other than as provided in (5)(c) below.

(d) In order to construct more desirable bid lines and/or to avoid operational problems such as illegalities, the Union Scheduling Committee may, on a month to month basis, waive restrictions regarding the construction of monthly bid lines.

(e) A Flight Attendant who desires to exceed the quarterly pay limitation for the third month of the quarter as outlined in Article 6-B(A) must indicate such option in the appropriate space on the monthly bid preference sheet. In no way will this provision be construed to allow the Company to unilaterally balance or add additional flight time above the quarterly pay limitation without Flight Attendant concurrence, except as specified in Article 6-B(V).

(4) Flight Attendant Assignment and Bidding

Bid packages shall be distributed, whenever possible, twenty (20) days prior to the end of each month. Flight Attendants will be allowed a minimum of ten (10) days, information permitting, to express their preferences. All such preferences must be legible. The date and time of closing of the bid preference period shall be indicated on the cover letter of the bid package and such date and time shall be final and binding in all instances.

(a) Each Flight Attendant should indicate a minimum of six (6) choices on the preference sheet regardless of seniority. Such choices should include at least two (2) separate flight assignments. Reserve Flight Attendants desirous of being moved up to a

pattern of open flights that can be developed into a line of time subsequent to any required balancing and prior to the 7th day of the month should indicate "open time" prior to their preferences for reserve run selections.

The letter "O" should be indicated in the appropriate block on the bid preference sheet.

(b) Each run selection shall be numbered and lettered. Run selections may be made singularly or in series. For series bidding, the run numbers must be side by side with a dash in the position column in between.

Example:

Series Bid: 999Z - A bid in ascending run order for all runs and available positions; 110-115Z - A bid in ascending run order for all inclusive runs and available positions; 140-137C - A bid in descending run order for all inclusive runs and positions.

Position: "A" signifies a bid for the senior Cabin Attendant position, "B" signifies that either "A" or "B" is acceptable, "C" signifies that either "A", "B" or "C" is acceptable, etc. "Z" in the position column always means a bid for all available positions.

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NOTE: The "A", "B" and "C" in no way relate to the position or duties Flight Attendants will assume on the airplane.

(c) Each Flight Attendant shall complete the line provided on the bid preference sheet to indicate his/her preference of flights for balance purposes. Such preference must be identified by flight numbers. A Flight Attendant bidding for a relief run may express his/her relief run preferences and

balance preferences as outlined below by listing the applicable letter code on the appropriate line of the bid sheet. To the extent possible preferences will be awarded in the order listed.

A - Specific time off

B - Weekends off

C - Commercial flights

D - Charter flights

E - Commercial and charter flights combination

F - Long flights

G - Short flights

H - Long and short flights combination

I - Intra-European

J - Combination of flights for maximum quarterly time

K - Back to Back flights.

(d) It will be the responsibility of each Flight Attendant to ensure that his/her preference sheet is deposited in the locked box or receptacle provided for that purpose by the time and date of the closing of bid preferences. Nonreceipt of a bid preference sheet will be handled in accordance with paragraph (5)(d) below. This provision shall not be applicable to the bidding practice currently in effect at JFK-I for Flight Pursers and Service Managers.

(e) When two Cabin Attendants desire to fly together during a bid period, the senior of the two shall not bid. The senior Cabin Attendant must only list the name and payroll number of the Cabin Attendant with whom he/she wishes to fly on the bid sheet. The junior Cabin Attendant must list all the bids and must also write the name and payroll number

of the Cabin Attendant with whom he/she wishes to fly. If the junior Cabin Attendant fails to write the name and payroll number of the senior Cabin Attendant, the senior Cabin Attendant shall be handled in accordance with paragraph (5)(d) below.

NOTE: If a senior Cabin Attendant enters any bid preferences the request for partner preference is negated.

(f) Flight Attendants who are absent from their base station by reason of vacation, illness, personal time off, leaves of absence or irregular flight operations during the period preferences are posted for bid shall be responsible for having their preferences submitted to the Crew Schedule Department. Valid excuses will not be limited to the above. Under unusual circumstances permission may be obtained from the General Manager - In-Flight Services to bid by telegram.

The bid preferences must be received by the Crew Schedule Department prior to the time and date of the close of bid preferences. If the above bid preferences are submitted by either telegram or certified U.S. Mail the Company will not be responsible for the nonreceipt of any bid preferences submitted in accordance with the above.

(g) All domiciles shall forward to all other domiciles (including Domestic domiciles) their bid packages as soon as they are distributed. These bid packages will be available in the domicile crew scheduling offices in order to provide information to Flight Attendants transferring per paragraphs (5)(e) and (f) below.

(5) Awarding Of Run Selections

(a) Run selections shall be awarded in accordance with seniority and posted. Every effort shall be

made to post the run selection awards within forty-eight (48) hours after the time and date of the closing of bid preferences.

Flight Attendants may call Crew Schedule during specified hours for bid results. Those specified hours will be indicated on the cover letter of the bid package.

If the bid results are not posted forty-eight (48) hours prior to the beginning of the new bid period, Flight Attendants may call Crew Schedule other than the specified times indicated on the cover letter for results.

At each domicile for each classification, copies of the alphabetical listing of monthly bid awards will be available for use by Flight Attendants.

(b) Pursuant to paragraph (4)(e) above, when awarding bids, the senior Cabin Attendant will be by-passed until the junior Cabin Attendant with whom he/she wishes to fly is reached. If there is only one open position on a flight, neither Cabin Attendant will be awarded it since they requested to fly together. If neither Cabin Attendant is able to be awarded an open position, their assignment, after all other awards have been made, shall be in seniority order and in the following order: A run selection, a pattern of open flights, or reserve.

(c) Flight Attendants who will be unavailable for an entire bid period will be by-passed in the awarding of bids. In the event a Flight Attendant returns to duty during the month, he/she will be given a sequence of open flights or a reserve schedule. However, those Flight Attendants who are expected to be on personal illness for thirty (30) days or more during a bid period will be awarded a bid run, seniority permitting, for the sole purpose of trips missed for sick leave. Effective with the implementation of the trips missed concept for jury duty, industrial injury, and vacation, Flight Attendants who will be unavailable for an entire bid period as a result of such status may, seniority permitting, be awarded a bid run for the sole purpose of establishing the trips missed credit/pay.

(d) If a Flight Attendant fails to bid or submits insufficient bids, his/her assignment, after all other awards have been made, shall be in seniority order and in the following order: A run selection, relief run selection, a pattern of open flights or reserve. However, in any month in which it is necessary to rebid due to schedule changes, a Flight Attendant who was absent from his/her base station during the period in which bid preference sheets were posted for bid shall be awarded a bid in accordance with his/her original bid for the month.

NOTE: If the run selection originally bid by such Flight Attendant has been eliminated because of the schedule change, and a rebid occurs as specified above he/she would revert to his/her next choice, etc.

(e) A Flight Attendant who is scheduled to transfer to another base station or who will resign during a bid period shall be entitled to bid at his/her present base station, only if he/she will be available at his/her present base station for a minimum of fifteen (15) days during such bid period; otherwise, he/she will be assigned to a pattern of open flights or to reserve.

(f) If a Flight Attendant's request for transfer to a new base station is awarded prior to or during the period bid preference sheets are posted at his/her new base station and he/she will be available for a minimum of fifteen (15) days during the subsequent bid period, such Flight Attendant may file a bid by either hand-delivered telegram or certified

U.S. mail, addressed to the Manager - Flight Attendant Utilization. Such bid must be received by the Manager - Flight Attendant Utilization prior to the closing of bids at that station. In the event such a bid is not received, the Flight Attendant will be assigned to a bid line, relief line, open time line or reserve whichever is available. Under extenuating circumstances, such as short notice of transfer or emergencies, his/her supervisor may, on occasion, accept telephone bids from the transferee.

(g) Run selections shall not be traded.

(h) Run selections not covered by bid shall be assigned in order of seniority.

(i) Flight assignments which form a complete relief run selection will normally be constructed by the first day of the bid period but in no case later than 0001 of the seventh day of such bid period. In no case will the relief run holder be considered a reserve during any part of the bid period.

(j) If, subsequent to any required balancing, but prior to the 7th day of the month, there is open time that can be developed into additional complete lines of time, such lines may be awarded, in seniority order, in their respective categories, amongst the following: Insufficient bidders, transferees or Flight Attendants holding a reserve run selection who have indicated a preference for Open Time. Subsequent to notification of assignment to Open Time, the Flight Attendant shall not be considered a reserve.

* * *

ARTICLE 24

UNION SECURITY

(A) Each employee now or hereafter employed in any classification covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days

following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such conditions shall not apply with respect to any employee to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification, or with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his/her classification as a condition of acquiring or retaining membership.

The condition of payment shall be met if the amount due is tendered to the Secretary - Treasurer of the Union in person or is mailed to him/her within the prescribed time limits.

For the purpose of this Article, "membership in good standing in the Union" shall consist of the payment by the employee, not later than the last day of the following calendar month, of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership. The employee may have his monthly membership dues deducted from his earnings as provided in paragraph (M) of this Article, or he/she may pay his/her membership dues directly to the Union.

(B) Any employee who has not held membership in good standing with the Union at any time on or after March 6, 1947, and who was in the employ of the Company previous to such date shall not be required, as a condition of continued employment, to become a member of the Union as set out in (A) above. However, any such employee who, subsequent to the effective date of this Article and during the term of this Agreement, joins the Union, must thereafter maintain his/her membership in the Union as provided in (A) above.

(C) Notwithstanding any other provisions contained in this Agreement, if any person is transferred or promoted to a position in which she or he is not covered by this Agreement, the provisions, of (A) above shall be inoperative as to such employee. This paragraph (C) shall not apply to an employee who is transferred or promoted on a "Temporary" or "Acting" basis, or any employee given special assignment, or Ambassador Club Hostess assignment, and any employee lent to a subsidiary, affiliate, or other company, who retains and continues to accrue seniority under the first paragraph of Article 10(C).

(D) When any person holding seniority under this Agreement returns to a position covered by this Agreement from layoff, leave of absence, military leave, or a position in which she or he was not covered by this Agreement, the appropriate provisions of this Article shall, at time of return, apply in the same manner as if she or he had been actively employed in such position on the effective date of this Article.

(E) When an employee becomes delinquent by not meeting the requirements of (A) above for "membership in good standing in the Union," the following procedure shall be observed:

(1) The Secretary-Treasurer of the Union shall notify the employee by certified letter, return receipt requested, copy to the Company's Director - Labor Relations, Flight, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. Such letter shall also notify the employee that she or he make the required payment within fifteen (15) calendar days of the date of mailing of the notice or be subject to discharge under the terms of the Agreement. If the notice above is not received by the employee or is delayed in reaching such employee as the result of the employee's failure to keep both the Company and the Union informed as to her or his correct current mailing address,

no extension in the time limit specified in the original notice is required.

(2) Upon the expiration of the fifteen (15) day period following the mailing of the notice in subsection (1) above, if the employee still remains delinquent the Secretary - Treasurer of the Union may certify in writing to the Company's Director - Labor Relations, Flight, that the employee has failed to make the required payment within the fifteen (15) day grace period and is, therefore, to be discharged.

(3) Upon receipt of a certified notice in writing from the Union to the Company's Director - Labor Relations, Flight, that the employee has failed to make the required payment within the fifteen (15) day period, defined in (E)(1), and therefore is to be discharged, the Company shall notify the employee in writing within twenty-four (24) hours of receipt of the Union's certified notice that he/she must make the required payment to the Union or verify to the Company previous payment made, within fifteen (15) days of the date of mailing of this notice from the Company.

Failure to verify or make such payment within this fifteen (15) day period will result in discharge.

(F) (1) If the employee discharged or to be discharged under this Article contends that she or he is not properly subject to discharge under the terms of this Article she or he may protest such action to the Trans World Airlines Flight Attendants' System Board of Adjustment provided that such protest in writing is mailed to the Board prior to the expiration of the fifteen (15) days set forth in paragraph (E)(3) of this Article. If the employee fails to file a protest with the Board his/her discharge shall be effective upon the expiration of the fifteen (15) day period as set forth in paragraph (E)(3).

(2) If a protest is filed as provided in (F)(1) above, such protest shall be submitted in triplicate to the Chairman

of the System Board of Adjustment, with one copy to be mailed in care of the Director - Labor Relations, Flight, 605 Third Avenue, New York, New York 10158, and the other copy to be mailed in care of the Secretary-Treasurer of the Union. The letter to the Chairman of the Board and both copies shall be sent by certified mail, return receipt requested. In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final and binding upon all parties concerned. Within ten (10) days of receipt of such a protect, the System Board of Adjustment will meet and consider the dispute. A representative of the Company, a representative of the Union, and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. Prior to the expiration of the work day following such Board meeting, the Board will issue either a majority decision or a notice of deadlock. If a majority decision is issued, it will be final and binding upon all parties concerned. If a deadlock is reached, and if at the time of the deadlock the Board cannot agree upon a neutral to sit with the Board to decide the dispute, the Board will immediately request the National Mediation Board to appoint a neutral, and the Board will meet with him at the earliest opportunity and decide the dispute. At the meeting of the Board, sitting with a neutral, a representative of the Union, a representative of the Company and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. A majority decision of the Board, including the neutral, will be issued within five (5) days after such meeting and will be final and binding upon all parties concerned. The expenses and reasonable compensation of the neutral selected as provided herein shall be borne equally by the parties to this Agreement.

(3) The provisions of Article 16 shall not apply to disputes arising under this Article, and the provisions of the Agreement establishing a System Board of Adjustment shall apply to such disputes except as they are superseded by the above provisions relating to procedures for handling disputes.

(4) During the period a protest is being handled under the provisions of this paragraph (F) and until after final award by the System Board of Adjustment the employee shall not be discharged from the Company as a result of alleged non-compliance with the terms and provisions of this agreement. If a decision is made that the employee should be discharged the discharge shall be effected the day following the issuance of the decision. In the event a reduction in force occurs during such time as an employee's status is being protested under the provisions of this Article, such employee will be considered as having seniority under this Agreement for purposes of effecting the reduction.

(G) Time limits specified in this Article may be extended in individual cases only, and then only by written agreement between the Company and the Union.

(H) An employee discharged under the provisions of the Article shall be deemed to have been "discharged for just cause" within the meaning of the terms of the Agreement.

(I) All letters and notices provided for by this Article shall be sent by certified mail, return receipt requested. Such letters and notices or copies sent to the Union shall be addressed to the Secretary - Treasurer of the Independent Federation of Flight Attendants, 630 Third Avenue, New York, New York 10017, while those sent to the Company shall be directed to the Director - Labor Relations, Flight, 605 Third Avenue, New York, New York 10158.

(J) When an employee is discharged or resigns, she or he will be considered as a new employee for purposes of this Ar-

ticle if she or he returns, at a later date, to pay status under this Agreement.

(K) Both the Union and the Company, or either of them, shall have the right at any time, to notify individual employees directly of any provisions of this Agreement.

(L) When new employees are hired or transferred into classifications covered by this Agreement the Company will furnish monthly to the Union the names, classification, point of employment and payroll register number of such new employees. The Company will furnish to the Union the names, present and previous classification, point of employment and payroll register number of all employees who may transfer out of classifications covered by the Agreement; in addition, the Company will furnish to the Union the names, location, payroll register number and status of employees covered by the Agreement who terminate their payroll status for any reason, such listings will be furnished monthly.

DUES AND INITIATION FEE CHECK-OFF

(M) During the life of this Agreement the Company will deduct from the pay of each member of the Union and remit to the Union initiation fees and monthly membership dues uniformly levied in accordance with the Railway Labor Act, as amended, and the constitution and by-laws of the Union, provided such member of the Union voluntarily executes the agreed form, which is hereinafter included in this Agreement to be known as "check-off form", which shall be prepared and furnished by the Union. The Company will not be required to deduct initiation fees and monthly membership dues from the pay of employees covered by this Agreement unless (i) the Company has received a check-off form and has not received a notice of revocation thereof, and (ii) the dues for the employee conform to the applicable dues for employees of his or her classification at his or her point on the system.

ASSIGNMENT AND AUTHORIZATION FOR CHECK-OFF OF INITIATION FEES AND UNION DUES

TO: TRANS WORLD AIRLINES, INC.

I, (print name) , hereby assign to the Independent Federation of Flight Attendants, my initiation fees and Union dues from any wages earned or to be earned by me as your employee and authorize and direct you to deduct the sum of $____ initiation fees and $____ each month, which are monthly membership dues (or such monthly membership dues as may hereinafter be established by the Union as dues for employees in my present or future classification under the Agreement upon notification to the Company by the Secretary-Treasurer of the Independent Federation of Flight Attendant(s) from one pay check per month and to remit same to the Secretary-Treasurer of the Independent Federation of Flight Attendants. This assignment and authorization may be revoked by me in writing after the expiration of one (1) year from this date, or upon the termination date of the applicable collective bargaining agreement between Trans World Airlines, Inc., and the Union in effect at the time this is signed, whichever occurs sooner. This authorization and direction is made subject to the provisions of the Railway Labor Act, as amended, and in accordance with existing agreement between the Union and the Company.

Employee Register No._____

Classification_____

Domicile_____

Date_____

Signature of Employee_____

Street Address_____

City and State_____

(N) When a member of the Union properly executes such check-off form, the Secretary-Treasurer of the Union shall forward the original signed copy to the Manager of Payroll, Kansas City Administrative Center, Kansas City, Missouri 64195. A check-off form must be completed in a legible manner or it will be returned to the Secretary-Treasurer of the Union for correction. Any notice of revocation as provided for in this Section or the Railway Labor Act, as amended, must be in writing, signed by the employee and two copies delivered by certified mail, addresssed to the Secretary-Treasurer of the Union. Dues deductions will be continued until one (1) copy of such notice of revocation is received by the Manager of Payroll, Kansas City Administrative Center, Kansas City, Missouri 64195, from the Secretary-Treasurer of the Independent Federation of Flight Attendants. Check-off form and notices received by the Manager of Payroll will be stamp-dated on the date received and will constitute notice to the Company on the date received and not when mailed.

(O) When a check-off form, as specified herein, is recieved by the Manager of Payroll fifteen (15) days or more before the issuing date of the first bi-weekly paycheck of the month, deductions will commence with such paycheck and continue thereafter until revoked or canceled as provided in this Article. The Company will remit to the Union a check in payment of all dues collected as soon after the pay day on which deductions were made, as practicable but no later than the 25th day of the month. The Company remittance of Union membership dues to the office of the Secretary-Treasurer of the Union will be accompanied by two (2) copies of a list for each location which includes (1) names, (2) employee register numbers, (3) location numbers, and (4) individual amounts deducted.

(P) An employee who has executed a check-off form and who has been (1) transferred or promoted to a job not covered by the Agreement, (excluding transfers or promotions on a "Temporary" or "Acting" basis), (2) who quits or resigns

from the Company, or is (3) otherwise terminated from the employ of the Company, shall be deemed to have automatically revoked his/her assignment as of the date of such action and if he/she (1) transfers back or returns to a job covered by the Agreement, (2) is rehired, or (3) re-employed further deductions of Union dues will be made only upon execution and receipt of another check-off form.

No deductions of Union dues will be made from the wages of any Flight Attendant who has executed a check-off form and who has taken a leave of absence without pay or who has been laid off. Upon return to work as a Flight Attendant, deductions will be automatically resumed, provided the Flight Attendant has not revoked the assignment in accordance with the other appropriate provisions of this Agreement and of the Railway Labor Act, as amended.

(Q) Collection of any back dues owed at the time of starting deductions for an employee, collection of dues missed because the employee's earnings were not sufficient to cover the payment of dues for a particular pay period, and collection of dues missed because of accidental errors in the accounting procedure, will be the responsibility of the Union and will not be the subject of payroll deduction. It will be the Union's responsibility to verify apparent errors with the individual Union member before the representative contacts the Company's Manager of Payroll.

(R) Deductions of membership dues shall be made from one (1) paycheck each month provided there is a balance in the paycheck sufficient to cover the amount after all other deductions authorized by the employee or required by law have been justified. In the event of termination of employment, there shall be no obligation of the Company to collect dues until all such other deductions (including money claims of the Company and the Credit Union) have been made, and such obligation to collect dues shall not extend beyond the pay period in which the employee's last day of work occurs.

(S) This Article shall be in force only so long as the Union continues as the recognized representative of the employees under this Agreement.

(T) The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company which action was requested by the Union under the provisions of this Article.

It is agreed that the Company will promptly notify the Union of all claims of liability made against the Company purusant to such action taken by the Company, and the Company will make every reasonable effort to defend itself against such liability.

* * *

ARTICLE 28

DURATION OF AGREEMENT

This Agreement signed this 12th day of April 1983 shall supersede and take precedence over all agreements, supplemental agreements, amendments, letters of understanding, except those contained herein, and similar documents executed between the Company and the Union prior to signing of this Agreement.

Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 shall remain in effect until July 31, 1984, and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act, as amended, by either party hereto, at least 90 days prior to the renewal date in each year.

IN WITNESS WHEREOF, the parties have signed this Agreement on April 12, 1983.

For the Company:

TRANS WORLD AIRLINES, INC.

/s/ J.C. Hilly
Vice President, Labor Relations

WITNESS:
/s/ JoAnn Capece
J.W. Hoar
Renée E. Kamm
G.M. Moran
Leo J. Murphy
K.L. Smith

For the Flight Attendants in the Service of Trans World Airlines, Inc. as Represented by the Independent Federation of Flight Attendants:

/s/ Arthur Teolis
President, IFFA

WITNESS
/s/ V.L. Frankovich
Mary Ellen Miller
C.W. Numrich
John E. Salvador

LETTER NO. 1

The Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO, and Trans World Airlines, Inc. hereby agree:

1. That the Flight Attendants will continue to perform those flight service functions which normally fall within their classification on flights which are solely military in nature and their cargo composed entirely of military commodities or personnel where the carriage of the traffic on such flights is certified by the United States Department of Defense as in accordance with the National interest even though the Flight Attendants withdraw from commercial service because of unresolved labor disputes of any type, includlng disputes arising out of negotiations for a new contract.

2. The pay and other benefits for Flight Attendants assigned to such military flights pursuant to paragraph 1 hereof, will

   (a) for any period prior to the opening date of the contract between the parties be governed by the then existing contract unless modified by agreement of the parties, and

   (b) after the opening date of the contract be governed by either the contract that existed at or prior to the said labor dispute or the contract negotiated as a settlement of such dispute, whichever is more beneficial to the Flight Attendants.

3. That this is consistent with the long-standing policy and performance of the Flight Attendants and of the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO.

4. In the event any employee is assigned to any military flight, pursuant to the terms of paragraph 1 hereof, the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO, will be given a certification by the Vice President of Industrial Relations or his designee that such flight will be exclusively for military purposes.

5. That, to the extent necessary to effectuate its purpose, this understanding constitutes an amendment and modification of the collective bargaining agreement between the parties hereto and, notwithstanding any other provision of the said collective bargaining agreement, this agreement shall continue indefinitely but may be revoked by either of the parties hereto upon two (2) years prior notice. However, if after the certification provided in paragraphs 1 and 4 the Company should willfully combine military with non-military traffic during the period of any strike, the Union will terminate this supplemental agreement forthwith. Proof of such violation shall be established through the adjustment procedures established by the collective bargaining agreement, but such procedure shall be accelerated to provide for a hearing and final decision within twenty-four (24) hours after the grievance is submitted. Should it be impossible to achieve a final decision within such twenty-four (24) hour period, such period shall be extended to the extent necessary.

Signed this 22nd day of October, 1970.

For TRANS WORLD AIRLINES, INC.

/s/ D.J. Crombie
Vice President - Industrial Relations

For THE AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

/s/ James F. Horst
International Executive Vice President

LETTER NO. II

Between

TRANS WORLD AIRLINES, INC.

and

FLIGHT ATTENDANTS

in the service of

TRANS WORLD AIRLINES, INC.

as represented by

THE AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550 TRANSPORT WORKERS UNION OF AMERICA AFL-CIO

This LETTER OF AGREEMENT is made and entered into in accordance with the provisions of Title II of the Railway Labor Act, as amended, by and between TRANS WORLD AIRLINES, INC. (hereinafter known as the "Company") and the Air Line Flight Attendants as represented by the AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO (hereinafter known as the "Association").

WITNESSETH:

It is hereby agreed between the parties that:

The Service Manager, as defined in Article 2(C) of the Basic Agreement, who shall be assigned only to those flights involving the use of B-747 aircraft, shall be paid the rates of pay applicable to Service Managers, if on international, including the compensation set forth in Article 3(D), or those rates of pay applicable to domestic Service Managers, if on domestic, as set forth in Article 3 of the Basic Working Agreement.

Utilization of a Service Manager on Domestic and International flights during any month shall not be a precedent for establishing a similar procedure with respect to any other Flight Attendant classification.

A Flight Pursar, as defined in Article 2(B) of the aforesaid Agreement, shall be assigned to those International flights involving the use of B-747 aircraft. Such Pursar shall not be assigned to any Domestic flights. A Flight Pursar assigned as set forth herein shall continue to receive the same compensation he presently receives under Article 3 of the aforesaid Agreement.

The expenses and work rules set forth in Articles 4 and 6, respectively, of the aforesaid Agreement which are applicable to the Company's International Operation shall apply to the Service Manager based on International.

Conversely domestic, wage rates, expenses and work rules will apply to Flight Attendants who are awarded Service Manager bids on domestic Service Manager sequences on domestic shall not contain international flights. The appropriate provisions of Letter of Agreement No. IX shall apply in the preparation of International Service Manager lines of time.

The Company shall assume the cost of all uniforms as may be prescribed by the Company for the Service Manager.

Vacancies in the Service Manager classifications on International shall be open for bid on a systemwide basis by employees who have served as a Flight Purser for one (1) year or more. Employees presently on the Flight Attendant System Seniority List shall not be retested for language proficiency. Vacancies in the Service Manager classification on the domestic operation shall be opened for bid on a systemwide basis by Flight Attendants who have served as a Flight Attendant for three (3) years or more.

Successful bidders to the Service Manager position on International shall be filled by Flight Pursers in accordance with their accrued seniority as Flight Attendants, provided the bidder meets current flight attendant weight and appearance standards. Successful bidders to the Service Manager position on

Domestic shall be filled by Flight Attendants in accordance with their accrued Flight Attendant seniority provided the bidder meets the current Flight Attendant weight and appearance standards.

If sufficient bids are not received to fill vacancies, Flight Attendants at the location where the vacancy exists will be assigned in inverse order of seniority from among those qualified Flight Attendants.

A successful bidder to a vacancy in the Service Manager position shall be restricted to that position for a period of six (6) months from the date such vacancy is filled.

During the pre-flight briefing standard positions, assignments and recognition of work positions by seniority bid preference will prevail. However, when a passenger imbalance exists among the cabins or service requirements justify, the Service Manager shall request volunteers from the cabin where least needed. If no Flight Attendant(s) volunteer, the Service Manager has the authority to reassign the most junior Flight Attendant(s) from the cabin where least needed.

In an emergency when it is necessary to assign a Service Manager to a lower classification, he shall receive no less than his current rate of pay. In such situations, the bid Service Manager shall be in charge.

Except as herein otherwise provided, the provisions of the Basic Agreement shall apply to this Letter of Agreement.

This Letter of Agreement shall become effective on the date of signing and shall remain in full force and effect concurrent with the Basic Agreement signed the 14th day of December, 1973.

For TRANS WORLD AIRLINES, INC.

Vice President - Industrial Relations

For THE AIR LINE STEWARDS AND
STEWARDESSES ASSOCIATION,
LOCAL 550 TRANSPORT WORKERS
UNION OF AMERICA, AFL-CIO

International Vice President

President
Air Line Stewards and
Stewardesses Association

* * *

Exhibit 5 (May 17, 1986 letter from V.L. Frankovich to J.W. Hoar)

[Letterhead of IFFA]

May 17, 1986

J.W. Hoar
Vice President - Labor Relations
Trans World Airlines, Inc.
605 Third Avenue
New York, New York 10158

Dear Mr. Hoar:

On behalf of all striking Flight Attendant employees, IFFA hereby demands that they be reinstated to their former positions or to equivalent positions of employment in accordance with their rights as unfair labor practice strikers.

In the event that you refuse to recognize the strikers' status as unfair labor practice strikes we hereby unconditionally offer, on behalf of all striking employees, to return to work immediately and we request their reinstatement. This offer is made on behalf of all employees who went on strike and have not returned to work to date. In the event there are no openings, or insufficient openings, as of the date you receive this offer, you are further advised that said employees will be available for employment to all openings as and when they develop or to vacancies created by the departure of employees now working.

We would appreciate a prompt reply stating your position and the action you intend to take.

Very truly yours,

/s/ VICTORIA LEE FRANKOVICH
Victoria Lee Frankovich
President

RECEIPT ACKNOWLEDGED:

/s/ J.W. HOAR	5-17-86	1000 PM
J.W. Hoar	Date	Time

Exhibit 6 (May 18, 1986 letter from V.L. Frankovich to J.W. Hoar)

[Letterhead of IFFA]

May 18, 1986

J.W. Hoar
Vice President - Labor Relations
Trans World Airlines, Inc.
605 Third Avenue
New York, New York 10158

Dear Mr. Hoar:

This will confirm IFFA's written and unconditional offer of an immediate return to work, made on behalf of all striking Flight Attendant employees, and our subsequent response to your questions that effective with that offer no such employees are withholding services from TWA.

In clarification of and consistent with that offer and, independently thereof, consistent with and pursuant to TWA's proposed "Preferential Rehire Agreement" embodied in TWA's May 14 "TWA Flight Attendant Settlement Proposal"-- which you have advised is still on the table and which, as I have advised you, will be submitted to a ratification vote of the IFFA membership -- please be advised of the following:

1 It is IFFA's position that by operation of the Railway Labor Act and other federal labor law and policy, TWA's status quo obligations and the IFFA-TWA Agreement, TWA is required to return Flight Attendants to work in seniority order.

2 In connection with any list of employees who unconditionally offer to return to work, including the freeze list referenced in TWA's May 14 proposal, IFFA has offered and hereby does offer the unconditional return of the individual holding Position Number 1 on the Seniority List (attached hereto).-

3 Having offered the unconditional return of the individual holding Position Number 1 on the Seniority List (thereby placing such individual first on any recall list) and in point of time after such offering, IFFA offers the unconditional return of the individual holding Position Number 2 on the Seniority List (thereby placing such individual second on any recall lists).

4 Having offered the unconditional return of, first, the individual holding Position Number 1 and, secondly and thereafter, the unconditional return of the individual holding Position Number 2 on the Senority List, and in point of time after such offerings, IFFA offers the unconditional return of the individual holding Position Number 3 on the Seniority List (thereby placing such individual third on any recall list).

5 In the same descending order, and one after the other in point of time, IFFA offers the unconditional return of each individual on the Seniority List, e.g., the holder of Position Number 4 after Number 3, the holder of Position Number 5 after Number 4, and so on for the entire remainder of the Seniority List.

In connection with the above, we note that the attached Seniority List is based on records furnished by TWA. In the event an individual has been inadvertently omitted from the list, such individual should be slotted in and have recall rights in accordance with his/her proper seniority placement.

In addition, please note that the attached Seniority List includes all Flight Attendants -- those who have not yet returned and those who have done so. TWA's information as to the identity of those who have already crossed picket lines and returned to work may be more complete than IFFA's. Accordingly if and when in the recall process TWA comes to the name of an individual who returned prior to IFFA's unconditional offer to re-

turn all employees, the recall should go to the next individual who has not returned prior to such unconditional offer.

Lest there be any misunderstanding, IFFA's unconditional offer is made independent of and irrespective of the outcome of the membership ratification vote on TWA's latest proposal. Moreover, employees will return to work as directed by the Company. In the event, however, that a recall to an opening is given to any employee other than the individual next entitled to such opening, TWA acts at its peril and IFFA will seek full backpay for each such next-entitled individual so passed over for his/her opening.

Very truly yours,

/s/ VICTORIA L. FRANKOVICH
Victoria L. Frankovich
President

RECEIPT ACKNOWLEDGED:

J.W. Hoar	Date	Time

Exhibit 7 (May 20, 1986 letter from J.W. Hoar to V.L. Frankovich)

[Letterhead of TWA]

HAND DELIVERY

May 20, 1986

Ms. Victoria Frankovich
President
Independent Federation of
Flight Attendants
630 Third Avenue
New York, NY 10017

Received
May 20, 1986
IFFA

Dear Ms. Frankovich:

As you know, after I had received your letter dated May 17, 1986 at 10:00 P.M. on that date, we had conversations for the purpose of clarifying what you meant by saying in that letter that you "unconditionally offer, on behalf of all striking employees, to return to work immediately." Your subsequent letter dated May 18, 1986, which I received yesterday, limits your offer and confirms my judgment based on your oral responses to my questions and on other events that your offer is not unconditional. Before I discuss that question, however, I would like to address the direct questions which your letters raise.

As I told you during the night of May 17, 1986, TWA does not agree with you contention that the striking Flight Attendants are unfair labor practice strikers and we do not recognize any obligation to treat them as such. Nor do we agree with your contentions in your letter of May 18 that "by operation of the Railway Labor Act and other federal labor law and policy, TWA's status quo obligations and the IFFA-TWA Agreement,

TWA is required to return Flight Attendants to work in seniority order." The IFFA-TWA Agreement expired by its terms on July 31, 1984. The status quo period mandated by the Railway Labor Act expired on March 6, 1986. We are advised, morever, that, far from requiring that strikers be returned in seniority order, federal labor law specifically gives the employer the option of filling its needs with those who in its judgment are best qualified, or on any other nondiscriminatory basis, in the absence of any agreement making seniority a controlling factor. See NLRB v. Mackay Radio and Telegraph Company, 304 U.S. 333, 345-6 (1938); Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981), 107 LRRM 2781, 2813.

Your proposal in your letter of May 18 seeks to have the benefit of the agreement which we proposed on May 14 without accepting or ratifying that agreement. Having said in your letter of May 17 that you "unconditionally offer, on behalf of all striking employees, to return to work immediately," you retract that offer in your letter of May 18 and convert it into an offer made, one at a time, for each of the Flight Attendants to return to work, in seniority order, singly. That is not an unconditional offer of all of the Flight Attendants to return to work. It is an offer that they will return to work in seniority order, a condition which you have no right to impose.

Detracting further from your alleged unconditional offer are signs observed yesterday at JFK International Airport being carried by picketing Flight Attendants, with the message "We will not cross over". Finally, both in your conversation with me and in your letter of May 18, you have refused to assure us that before your union reinstitutes a strike by Flight Attendants, acting collectively, who may have returned in accordance with your "unconditional" offer, TWA will have reasonable notice so that it may accommodate its operations to such further possible disruption.

As you know, many of the striking Flight Attendants have been permanently replaced. In the circumstances, we have decided not to add any additional Flight Attendants until after the result of the ratification vote, which we understand is scheduled

for tomorrow, is known, and no Flight Attendants have been added since 10 P.M. May 17, 1986.

Yours very truly,

/s/ J.W. HOAR

J.W. Hoar
Vice President -
Labor Relations

Exhibit 8 (May 21, 1986 letter from V.L. Frankovich to J.W. Hoar)

[Letterhead of IFFA]

May 21, 1986

Mr. J.W. Hoar
Director - Technical & Contract Liaison
Trans World Airlines
605 Third Avenue
New York, NY 10158

Dear Mr. Hoar:

Your letter of May 20 misrepresents and mischaracterizes IFFA's offer to return to work. In every respect, that offer was, is and will continue to be unconditional. No letter from this Union "retracted" our unconditional offer. As we advised you, no employee is withholding services. As we further advised you, if recall is made out of seniority order, employees so recalled will return to work -- but IFFA will seek full backpay for each employee passed over for an opening that would be his/hers if based on seniority. Seniority recall, as our letters made clear, is not a condition of our offer, but we maintain and will continue to maintain that it is an obligation imposed on TWA by law, contract and TWA's own May 14 proposal. The reservation of IFFA's right to pursue our claim through proper and orderly legal channels does not in any way detract from the "unconditional" nature of our offer to return.

Before closing, I want to address the matters raised in the penultimate paragraph of your letter.

In telephone discussion with you after our offer to return to work, I advised that we still have a dispute with TWA that we

intended to publicize -- but since we are no longer withholding our services, picket signs with "strike" or "on strike" would be taken down. I also advised that, with members spread throughout the System, there may be some time lag before the word got out -- with some unavoidable individual deviations in the meantime. You indicated that you understood this and I am surprised by your comments about an isolated instance at JFK. Be assured that such isolated deviations are exactly that, are contrary to IFFA's instructions and do not detract from the unconditional nature of our offer.

Finally, please be advised that you never requested and I never refused assurances of reasonable notice of future strike action following a return of strikers to work. This issue has never been discussed by us, and at no time did I even threaten strike action. In answer to your question about any future strike, I advised that IFFA would take no action inconsistent with an unconditional offer to return to work, but reserves the right to take any action not legally inconsistent with an unconditional offer to return.

Yours truly,

/s/ VICKI FRANKOVICH
Vicki Frankovich
President

RECEIPT ACKNOWLEDGED:

/s/ J.W. HOAR	5-22-86	0848
J.W. Hoar	Date	Time

Exhibit 13 (May 23, 1986 letter from J.W. Hoar to V.L. Frankovich)

[Letterhead of TWA]

HAND DELIVERED

May 23, 1986

Ms. Victoria Frankovich
President
Independent Federation of
Flight Attendants
630 Third Avenue
New York, NY 10017

Dear Ms. Frankovich:

Your letter of May 21, 1986 in reply to mine of May 20 states that all Flight Attendants who have been on strike are now willing to return in whatever order they are called by TWA, subject to a continuing claim that they are entitled "by law, contract and TWA's own May 14 proposal" to return in seniority order, the order in which you meticulously, paragraph by paragraph, offered their return to work in your letter of May 18. We do not regard such an offer, so conditioned, with such reservation of position, and without the assurance of reasonable notice of any resumed withdrawal of service, which you still avoid giving in your most recent letter, as an unconditional offer to return to work. See American Cyanamid v. NLRB, 592 F.2d 356,361-63 (7th Cir. 1979). Nor do we agree that we must rehire strikers in seniority order.

It may not be necessary, however, to continue this discussion or resolve the disputed matters in view of action we are now taking. Despite your notification to us that IFFA has refused TWA's May 14, 1986 comprehensive settlement proposal, we are at this time putting some parts of that proposal into effect:

First, we hereby implement our offer to freeze our active permanent Flight Attendant work force and to place all striking Flight Attendants (those who have not been returned to active service) on a preferential rehire list from which they shall be rehired for active service if immediately available for such service to fill vacancies in order of seniority, subject to the reservation in the last sentence of paragraph 14 of the proposed Preferential Rehire Agreement.

Second, we hereby implement paragraph 3 of TWA's Settlement Proposal of May 14, 1986. We expect to issue the procedures to which reference is made in that paragraph for the administration of that program by Wednesday, May 28, 1986. Some of the Flight Attendants who were on sick leave or in other medical disability status on March 6, 1986, and whose affidavits and supporting documents are attached as Exhibit 21 to IFFA's proposed Second Amended Complaint may have thereby supplied substantially all of the information that TWA expects to require, with the exception of information as to their current condition and/or expected recovery date. We will begin processing claims by such Flight Attendants on the basis of the available information.

Third, TWA also hereby puts into effect its proposals in paragraphs 4 and 8 of the May 14 Settlement Proposal, leaving 1986 vacation unreduced and reducing eligibility for the Flight Service Manager position to one year of service as a Flight Attendant.

The entire May 14 Settlement Proposal remains available for acceptance by IFFA until formally withdrawn by TWA.

Yours very truly,

/s/ J.W. HOAR

J.W. Hoar
Vice President
Labor Relations

JWH:avv

Exhibit 14 (letter to full-term strikers offering reinstatement)

[Letterhead of TWA]

May 24, 1986

Jeanne M. Huebner
1843 E. 68th
Kansas City Mo. 64132

Dear Ms. Huebner

TWA hereby offers to rehire you as a flight attendant on or about May 29, 1986. This offer is subject to your unconditional commitment to return to the flight attendant position in the status and to the domicile to which you will be assigned.

To indicate your acceptance of this offer, you are to report in person for reprocessing, ready for immediate assignment, with uniform, In-Flight Service Manual, Emergency Procedures Handbook, flashlight and passport in your possession at 9:30 o'clock on May 29, 1986 to the In-Flight Services office, TWA Terminal, Lambert St. Louis International Airport, St. Louis, Mo. 63145.

As soon as possible following your report for reprocessing, you will be advised of the status and domicile to which you will be assigned. Vacancies will be filled for Flight Service Manager - JFK, Cabin Attendant - JFK and Cabin Attendant - BOS. Insofar as possible, we will consider your preference for assignment.

This offer of rehire is made to you based on your position on our Preferential Rehire List. It assumes that your relative seniority has not changed since March 6, 1986. If, in fact, this is in error, TWA reserves the right to withdraw this offer and will

offer this vacancy to a TWA flight attendant on the Preferential Rehire List with a greater relative seniority.

Please be advised that should you not return to the service of the company on May 29, 1986, your name will be removed from the Preferential Rehire List, and you will no longer have any preferential right to be rehired by TWA.

Yours truly,

/s/ DIANE CROLL

Diane Croll
Director - In-Flight
Services Administration

Excerpt from Exhibit 15 (May 28, 1986 letter from J.W. Hoar to V.L. Frankovich)

[Letterhead of TWA]

HAND DELIVERY

Received
May 28, 1986
IFFA

May 28, 1986

Ms. Victoria Frankovich
President
Independent Federation of
Flight Attendants
630 Third Avenue
New York, NY 10017

Dear Ms. Frankovich:

With reference to my letter of May 23, 1986 I am enclosing the alphabetical listing of Flight Attendants contacted for return to active service.

Numerically, there are 197 names in order of seniority from the January 1, 1986 listing compiled by TWA.

Very truly yours,

/s/ J.W. HOAR
J.W. Hoar

Enclosure

cc: W. S. Borden
R. J. Kenny

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-8

Excerpts from Affidavit of William S. Borden, filed August 25, 1986, in Opposition to IFFA's Motion for Partial Summary Judgment and in Support of TWA's Cross-Motion for Partial Summary Judgment

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization, 630 Third Avenue New York, New York 10017,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., Kansas City International Airport Kansas City, Missouri,

Defendant.

State of New York :
: ss.:
County of New York :

William S. Borden, being duly sworn, deposes and says:

1. I am Vice President, In-Flight Services for Trans World Airlines, Inc. ("TWA"). I have been employed by TWA for about 35 years, first as a Flight Purser, and thereafter in a succession of management positions including Manager - Hostess, Purser Training; General Manager - In-Flight Services at JFK; Director In-Flight Services Training and Staff Vice President, In-Flight Services. I have held my present position since 1984, and my office is at 605 Third Avenue, New York, N.Y.

2. In my present position, I report directly to TWA Senior Vice President, Operations, Richard T. Kenny. I have overall

responsibility for TWA flight attendants, including responsibility for maintenance of service and safety standards in the cabins of all TWA aircraft.

* * *

TWA-IFFA Agreement Signed April 12, 1983

4. On April 12, 1983, TWA and IFFA signed an agreement (the "1983 Agreement") establishing the rates of pay, rules, and working conditions of TWA's flight attendants, who were classified under the terms of that agreement as Cabin Attendants, Flight Pursers (required only in international operations), and Service Managers (required on all wide-bodied aircraft). The 1983 Agreement is Exhibit 1 to the parties' Stipulation of Undisputed Facts (hereafter "Stip").

* * *

Notices of Intended Change in the 1983 Agreement

6. By letter dated February 29, 1984, TWA served on IFFA a notice of intended change in the 1983 Agreement, and its proposals for a new agreement. (Stip Ex. 2).

7. TWA's proposals for a new agreement, which were intended to decrease TWA's flight attendant costs and increase the productivity of its incumbent work force, included a reduction in the rates of pay of incumbent flight attendants, a separate lower pay scale for flight attendants hired after the effective date of the agreement (a "B" scale), and substantial changes in onerous and restrictive work rules. (Id.)

8. Conferences began on March 29, 1984, and on April 27, 1984, IFFA served a notice of intended change in the 1983 Agreement. (Stip Ex. 4). IFFA's proposals for a new agreement would have substantially increased TWA's flight attendant costs.

9. TWA invoked the services of the National Mediation Board (the "NMB") on or about May 13, 1984, and conferences were held at intervals until May 22, 1985, when they were recessed by the NMB.

* * *

14. In October 1985, while the details of the new comprehensive proposal were under discussion, TWA began to plan on the basis of its developing proposal, which was expected to be and, in fact, was ready for submission to IFFA by mid-November.

15. TWA management, including myself, assumed that after a year and a half of negotiations, TWA's new comprehensive proposal (including the "early out" option), would shortly produce either a new agreement with an early out option, or exhaustion of the RLA statutory procedures without agreement and a strike by TWA's flight attendants.

16. We believed that in either event, TWA would need to hire a substantial number of new flight attendants as early as January 1986. Accordingly, while the precise terms of the new comprehensive proposal were still under discussion within TWA, the decision was made to begin recruiting applicants for training at the Trans World Travel College ("TWTC") at TWA's Jack Frye Training Center in Kansas City, Missouri. R. Stan Henderson, Director of In-Flight Service Training at the Training Center, had primary responsibility for the recruitment and training of potential new-hire flight attendants, and I worked very closely with him.

17. Beginning in late October 1985, TWA placed newspaper advertisements nationwide announcing that it expected to hire flight attendants in 1986, and inviting interested individuals to attend seminars where they could learn about admission to the flight attendant training program at Kansas City, and TWA's plans to hire flight attendants. (Exhibits to this Affidavit are submitted in a separately bound Exhibit Appendix which contains a copy of a TWA advertisement as Exhibit B-1.)

* * *

25. The first class of trainees interested in potential 1986 TWA flight attendant positions began training at the TWTC on November 4, 1985. Classes included up to 20 students. A new class and, by November 16, 1985, two new classes began daily except on certain holidays.

* * *

The 30 Day "Cooling Off" Period

37. On February 4, 1986, the NMB notified TWA and IFFA that the 30 day "cooling off" period had begun. Accordingly, if no new agreement was reached by midnight, March 6, 1986, both parties would be free to resort to self-help. IFFA would be free to strike and TWA would be free of its status quo obligations. By its stated terms, TWA's early out proposal would "drop dead" if no agreement had been reached by midnight March 6.

* * *

40. (a) In a letter dated February 10, 1986, distributed to all Travel College students, appended as Exhibit B-11, I again responded to questions by students, and to Ms. Frankovich's statements, exemplified by her February 10 statement that TWTC students were being trained as temporary strike replacements. My letter repeated the reasons why large numbers of successful TWTC graduates were likely to be needed and hired in early March. The letter said that one of the reasons they might be needed was to replace strikers and that if they were hired during a strike, they would be hired as strike replacements.

> "Since you may be offered employment as a TWA flight attendant whether there's a strike or not, there are some facts we believe you should know.
>
> * * *
>
> We hope to succeed in negotiating a mutually satisfactory agreement with IFFA covering these matters, so that we can move vigorously ahead. However, if a failure of the bargaining process results in a strike, we must be prepared to maintain normal flight operations by augmenting our flight attendant workforce promptly with new hires. That's why you're the target of IFFA's present picketing.
>
> * * *
>
> Under the law, TWA would be free to hire replacements for any or all strikers - and you can be assured TWA would hire qualified Travel College graduates to keep the

> airline operating. In addition, after a strike ends, TWA would be legally free to retain in its employ those hired during the strike. Again, you can be assured that TWA would continue to employ those hired during the strike."

(b) My February 10, 1986 letter repeated my November 1985 explanation as to why TWA expected to need to hire a large number of replacements for incumbent flight attendants early in 1986, whether or not there was a strike.

> "In all of our advertising and recruitment efforts we are stating that we are recruiting and training for expected Flight Attendant openings in 1986. We will probably require a large number of new Flight Attendants as early as March of 1986. We cannot determine how many Flight Attendants we will need until negotiations with IFFA are concluded. The process is complex, but simply stated, we expect to require new Flight Attendants for one or more of the following reasons:
>
> 1. Turnover among existing work force. When the new contract is finalized, many senior Flight Attendants may elect to retire early or resign due to special incentives or changes in the new contract. This was true at AA, UA and NW, and may be true at TWA.
> 2. Increased aircraft utilization. The number of Flight Attendants an airline requires is a function of the amount of time each aircraft is flown on a daily basis, the size of the crew and the work rules. All of these are separate variables and may cause TWA to need more or fewer Flight Attendants.
> 3. New aircraft. TWA recently announced the intended acquisition of 10 MD-80s in 1986 and that it is looking for the purchase or lease of Boeing 737s. If the new contracts allow for a profitable projection, this could occur quickly.
> 4. The possibility of a strike. This is of course, the possibility that most concerns IFFA and is the reason for the informational pickets outside.

TWA will continue to make every effort to conclude an agreement with IFFA. However, if a strike does occur, TWA will continue operations and will then hire new personnel to replace those on strike. If you are not already employed as a Flight Attendant then, you may be offered a position. Whether or not you choose to accept the offer is up to you."

(c) The February 10, 1986 letter, like my earlier letter, responded to questions newly asked or repeatedly asked by students often as a result of statements in IFFA's flyers and by flight attendants picketing at the Training Center. In the Question and Answer format, I again said that TWA expected to require new flight attendants (1) if an agreement was reached or (2) if there was no agreement and TWA flight attendants struck. The February 10, 1986 Questions and Answers included the questions frequently asked by students who had received IFFA's letters and flyers:

"Q. Is IFFA telling the truth when it says that TWA plans to hire Travel College graduates only as 'temporary workers' in the event of a strike?

A. No. This statement is absolutely false. All Travel College graduates hired by TWA will be employed as regular, full-time employees. If you are hired during a strike, you will be treated as 'permanent replacements' under federal law, meaning that you will not be furloughed to make room for returning strikers.

Q. What about IFFA's claim that 'the jobs of workers who go out on strike are protected,' and that at the end of the strike 'Flight Attendants who struck go back to work on the basis of seniority?'

A. Here, again, IFFA is sericusly misstating the law. No one who goes out on strike will have a job at TWA when they offer to return until and unless there are vacancies. The only protection that the law provides to strikers is the right to be put on a rehiring list in the event of future vacancies. Those Flight Attendants

who work during the strike will not be furloughed to make room for strikers (regardless of seniority) who later offer to return. For those Flight Attendants who do decide to strike and then later offer to return to work, it will be first come, first served on filling any vacancies." (Id., emphasis added).

41. My February 10 letter, with the attached questions and answers, was mailed to all previous graduates of the Travel College who had been selected as "eligible for hire", at their home addresses, provided to TWA for use in the event that TWA determined to make those graduates an offer of employment. The February 10 letter and attachments were distributed to all Travel College students who enrolled in the Travel College thereafter, and was posted at the Training Center.

* * *

46. Contract negotiations were in recess in the period February 8-19. During that recess, by letter dated February 13, 1986, appended hereto as Exhibit B-13, I told all incumbent TWA flight attendants that while TWA did not want a strike, TWA would hire permanent replacements if there was a strike:

"The Company does not want a strike and will do everything possible to reach an agreement prior to March 7, 1986. While we do not wish to strike you should be aware that if there is a strike TWA Will Continue to Operate . . . . If you do not report for work, the Company is permitted under the law to hire 'permanent' replacements for striking employees. We plan to exercise this right, if necessary, in order to continue flight operations." (Ex. B-13, emphasis in original.)

The letter was placed in all flight attendant mailboxes, and mailed to all flight attendants, including those in inactive status, at their homes.

* * *

59. (a) On February 28, 1986, I again wrote to all incumbent TWA flight attendants, informing them that if they chose not to work during the strike, they would be permanently replaced by flight attendants hired during the strike. My letter said that "while negotiations are scheduled to resume March 1, a strike commencing at 001, March 7, remains a distinct possibility." That letter, appended hereto as Exhibit B-15, was distributed to active flight attendants in their crew mailboxes and mailed to the homes of flight attendants not on active duty.

(b) The Questions and Answers attached to my February 28 letter, include the following:

Q. "Can I be permanently replaced if I choose not to work during a strike?

A. Yes. For example, if TWA hires 3,000 new flight attendants during the strike, it can be expected that about 3,000 strikers will not have jobs when the strike ends. Those who don't have jobs at the end of the strike will be put on a preferential hiring list to fill future vacancies as they may occur.

Q. Will seniority be used in deciding which returning strikers receive offers to fill job vacancies as they occur?

A. No. Seniority will not be a factor."

(c) Copies of my February 28 letter were also sent, for informational purposes, to TWTC graduates who had been notified that they would receive an offer of employment on or after March 7, if they (1) informed TWA that they would like to receive an offer, and (2) then appeared at the designated TWA domicile to receive an offer.

60. On March 1, 1986, TWA Chairman Carl Icahn addressed a letter to all TWA employees attaching "pertinent excerpts from a CBS press interview." The excerpts included the following question and answer

"Q. Is TWA prepared for a strike?

A. We now have trained and ready to be hired 1,500 new flight attendants. We have another 1,500 people qualified to go in temporarily. With the new work rules, we need only 3,500 flight attendants to operate the airline until June and by then we will have many more trained -- so we're pretty well ready for March 7th. We hope there won't be a strike, we'd like there not to be a strike, but if there is, we probably won't have jobs for many of the strikers when the dispute is finally resolved."

A copy of that letter is appended hereto as Exhibit B-16.

* * *

62. No agreement had been reached by midnight, March 6, 1986. IFFA announced a strike shortly after midnight, and TWA thereafter put into effect new rates of pay and work rules. Under the terms of TWA's final proposal, its buyout offer became ineffective as of midnight on Thursday, March 6.

* * *

Hiring and Training of Additional
Flight Attendants and Return of Strikers

81. On March 7, less than a hundred pre-March 7 flight attendants crossed IFFA's picket lines and reported for work.

82. TWA's pre-strike planning had assumed that a higher percentage of flight attendants would not strike, and TWA expected that by peak season, it would need 5,000 flight attendants. In the first few days of the strike, TWA was operating with slightly under 1,400 permanent flight attendants, and using contingent work force employees and Clipped Wingers to fill additional places left vacant by strikers. Accordingly, the decision was made to increase the rate at which new hire flight attendants were recruited and trained and to make every effort to secure a commitment from recruits to accept employment

and complete training. The first post-strike class was scheduled to begin on Monday, March 10, 1986.

* * *

85. A week after the strike had begun, TWA Chairman Icahn wrote a letter to all TWA flight attendants. Although directed primarily to striking flight attendants, Mr. Icahn's March 14, 1986 letter was sent to all TWA flight attendants, including new hires. The letter assured striking flight attendants that if they returned to a still vacant flight attendant position, they would not be displaced at the end of the strike, but said that TWA had hired and was continuing to hire permanent replacements for strikers.

> "We continue to be willing to negotiate, and hope IFFA will reach agreement with us soon. But it's important for you to understand clearly that, at the rate of two classes a day, every day, we continue to train and hire new flight attendants on a permanent basis. Far from 'waiting in hideaway hotels for their first flying assignment because [our] flights aren't operating' (as the union would have you believe), they're in the air and on the job." (Appended hereto as Exhibit B-20) (emphasis added).

* * *

87. (a) On March 17, 1986, Mr. Icahn sent a mailgram to all TWA flight attendants, including those on strike. The mailgram announced a March 21 award of vacancies to working flight attendants, and the shrinking number of available vacancies:

> "Effective March 21, transfers will be awarded to fill Flight Service Manager and Cabin Attendant vacancies throughout the TWA system. Only active Flight Attendants with a transfer request or telegram on file received at TWA Headquarters, 605 Third Avenue, New York, by 5 P.M. (EST) Thursday, March 20, will be eligible for transfer. Vacancies still existing after the transfer will be assigned to new hires. For your information, for April 1986 only 67 more Cabin Attendants are required at San Francisco and 123 more for Los Angeles. These are all expected to be filled by March 21." (Appended hereto as Exhibit B-22)

(b) The March 17 mailgram made a commitment to striking flight attendants, and all pre-March 7 flight attendants who were then working:

> "We guarantee you if you work throughout the remainder of the strike you will not be replaced when the strike is over."

It made clear that the newly hired flight attendants, to whom the mailgram was also addressed, had permanent positions and had permanently replaced an equal number of striking flight attendants.

> "IFFA says 'all jobs will be guaranteed' when a settlement is reached. FACT: With our new work rules, in the peak season we'll need only 5,000 Flight Attendants to run the airline. With 1600 new hires now on the payroll (not counting the contingent work force of 1500), even if everyone wanted to come back, we would only need less than 3500 out of the original Flight Attendant work force of 6500."

88. From the beginning working flight attendants were required to cross vocal and hostile picket lines to go to work. Working flight attendants were harassed, and threatened as they crossed picket lines. Many received threatening and obscene phone calls. A pre-strike letter from Ms. Frankovich to an IFFA member, appended hereto as Exhibit B-23, contained the following passage.

> "4. What will Flight Attendant pay scale be like in the event of a strike if Flight Attendants cross the picket line?

(A) First of all, their legs will be broken so they won't be able to cross the line. No, seriously, there is no way to tell. Once the parties are released to self-help, at the end of a thirty-day count down, the Company is free to unilaterally impose whatever wages and work rules they desire."

* * *

90. On March 29, 1986, Mr. Icahn wrote another letter to TWA flight attendants. His message was addressed particularly to the newly hired and other flight attendants working under those stressful conditions:

"First I want to express my sincere appreciation for the superb job our newly hired and other working flight attendants are performing under somewhat trying circumstances. . . . I also want you to know how pleased I am at the cool, calm and professional way our working flight attendants have handled the strikers' harassment tactics. Unfortunately, this form of activity seems to be a part of every strike, and is likely to continue for some time as those remaining on the picket lines see more of their fellow flight attendants returning to work. For our part, we are making every effort to provide appropriate security arrangements wherever needed. Please continue to report any harassment incidents to your supervisors so that TWA can take proper action.

I have heard that IFFA continues to threaten newly hired and other working flight attendants by indicating that they will lose their jobs when the strike is settled unless they cease working and join the picket line. This threat is so empty that I am surprised that IFFA persists in making it. Let me reassure you in writing that if and when a settlement is reached, under no circumstances will newly hired or other working flight attendants be furloughed to make room for returning strikers. This is a personal commitment from me that you can absolutely count on."

The March 29, 1985 letter is appended hereto as Exhibit B-24.

91. On April 15, at Mr. Icahn's request, J.W. Hoar, TWA's Vice President - Labor Relations, responded by letter to a telephone call from a striking Flight Attendant.

"First, we are encouraged that you are seriously considering crossing the picket line and returning to work. More than 700 of your fellow Flight Attendants have already made that prudent decision and are in great part responsible for the Company's successful continuation of operations during the strike.

Second, let me repeat Carl Icahn's earlier assurance, that if and when a contract settlement is reached, under no circumstances will newly hired or other working Flight Attendants be furloughed to make room for returning strikers. When you again become an active employee, this commitment is to you."

A copy of the letter is appended hereto as Exhibit B-25.

92. On the same day, Mr. Hoar wrote to a former striker.

"First of all, welcome back to work. Along with over 700 of your fellow Flight Attendants, you've made the difficult but prudent decision to return as an active employee.

* * *

Let me repeat Carl Icahn's earlier assurance, that if and when a contract settlement is reached, under no circumstances will newly hired or other working Flight Attendants be furloughed to make room for returning strikers."

A copy of the letter is appended hereto as Exhibit B-26.

93. Among the April crossovers was a former long-term IFFA officer and one of IFFA's 1986 strike coordinators. Both were treated in the same way as all other returning strikers. They were reinstated to available vacancies, and credited with full pre-strike line seniority.

94. A letter I received in April from a crossover who had not been a union activist explained the reasons for her decision. A

copy of her letter, showing how difficult that decision was for her, as it must have been for many strikers, is appended hereto, with her name redacted, as Exhibit B-27. The decision to return and continue working was made more painful for many cross-overs who, while considering their decision or after making it, received signed or anonymous messages from striking flight attendants. Those messages, many of which I have seen, ranged from assurances of future ostracism to obscene and insulting remarks, and in some cases death threats or threats of bodily injury.

95. Flight Attendants who returned to work after having been on strike were assigned by TWA to available vacant positions. In some cases, they returned to the domicile to which they had been assigned before the strike. In other cases, there was no vacancy at the pre-strike domicile and they were assigned elsewhere. In some cases, returning Cabin Attendants with sufficient pre-strike seniority were assigned to Service Manager positions, at their pre-strike domicile or elsewhere. Some former Service Managers elected to become Cabin Attendants to remain at their pre-strike domicile or to transfer to a more desirable one. The Purser position was abolished as of March 7, 1986, and former Pursers returned as Cabin Attendants or Service Managers. Effective April 1, 1986 Kansas City became a satellite operation for St. Louis. Flight attendants then assigned to Kansas City elected to be reassigned to St. Louis, with the exception of one who bid for and was awarded a position at another domicile.

96. TWA assigned returning flight attendants their pre-strike line seniority for bidding purposes -- in bidding for domicile and classification vacancies, and in bidding for flight assignments, which TWA reinstituted effective April 1.

97. (a) Determination of whether a particular crossover returned to the same domicile and job category as he or she had before the strike would require analysis of the pre-strike and post-strike domicile and category of each individual. A random sample of pre-March 7, 1986 flight attendants who returned to

work before May 17, however, listed by pre-strike seniority, shows the following result:

	Pre-3/7 Line Seniority Date	Pre-3/7 Domicile and Category	Return Date	5/17 Domicile and Category
1.	6/25/72	STL - CA	5/04	JFK - CA
2.	4/28/73	STL - CA	4/26	JFK - CA
3.	6/16/73	STL - CA	4/29	JFK - CA
4.	6/30/73	STL - CA	4/18	JFK - CA
5.	8/17/73	STL - CA	5/01	JFK - CA
6.	6/02/77	JFK - P	3/14	JFK - FSM
7.	6/16/77	JFK - P	4/24	JFK - FSM
8.	6/30/77	JFK - CA	4/11	LAX - CA
9.	4/20/78	JFK - CA	3/20	LAX - CA
10.	4/15/85	JFK - CA	3/19	SFO - CA
*11.	4/29/85	JFK - CA	5/14	JFK - CA
12.	4/29/85	JFK - CA	3/12	SFO - CA
*13.	5/06/85	JFK - CA	5/13	JFK - CA
14.	5/20/85	JFK - CA	3/20	LAX - CA
15.	5/27/85	JFK - CA	3/12	LAX - CA
*16.	6/03/85	JFK - CA	5/05	JFK - CA
*17.	6/24/85	JFK - CA	5/05	JFK - CA

(b) In light of the continued absence from the workforce of many senior flight attendants, and the extent to which relative seniority defined the positions held by working flight attendants both before the strike and under the conditions existing on May 17, no flight attendant was in his/her pre-strike position on May 17, 1986, including the four relatively late returning strikers (indicated by asterisks) who were in their pre-strike domicile and category on that date.

* * *

100. On or about May 24, 1986, TWA communicated with some 197 flight attendants shown on its records as on strike on May 17, and as having the most pre-strike seniority, as listed on TWA's Preferential Rehire List. (Stip. Ex. 15) High on the list was Shirley Beck, a long-time IFFA officer, who declined TWA's offer to return to work. Ms. Beck was later determined

by TWA to have been medically disabled during the entire strike and was placed in continued sick leave status, with the right to return to her prior domicile and position on presenting evidence that she is no longer disabled. Ms. Beck would have to complete initial training to be eligible to fly as a member of an FAA minimum crew.

101. TWA's offer of rehire to 197 flight attendants shown on its records as strikers on May 17, exceeded its actual expected peak season requirements for safety qualified flight attendants, which were for about 150 flight attendants in addition to those already on its payroll. Flight attendants who accepted TWA's offer of rehire were an IFFA strike coordinator at Phoenix, and Jane Burrell, an activist, who regularly worked in IFFA's St. Louis office in the absence of full time IFFA representative Michael McDermott, a member of the IFFA negotiating team. Those flight attendants returned to work at their choice of domiciles and job categories where vacancies existed. On return to work, they were credited by TWA with their full pre-strike length of service for seniority purposes, including bidding for domicile and job category vacancies, vacations, protection from layoff and priority on recall. Those reinstated strikers accordingly are among the most senior members of TWA's flight attendant workforce.

/s/ WILLIAM S. BORDEN
William S. Borden

Sworn to before me this
1 day of August, 1986.

/s/ VIVIAN FALCONI
Notary Public

Vivian Falconi
Notary Public, State of New York
No. 41-4835878
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1987

Exhibit B-11 (February 10, 1986 letter from W.S. Borden to travel college students, with excerpts from attachment)

[Letterhead of TWA]

February 10, 1986

Dear Travel College Student:

Recently, the Independent Federation of Flight Attendants (IFFA), the union that represents TWA's flight attendants, began picketing the Travel College, with the stated purpose of preparing for a possible strike. TWA hopes it can agree with IFFA on the terms of a new contract without a strike, but in view of IFFA's statements and actions to date, we have to be realistic about the possibility that one may occur. Since you may be offered employment as a TWA flight attendant whether there's a strike or not, there are some facts we believe you should know.

TWA has a long tradition of service to its passengers, and we're proud that our flight attendants have made a major contribution to that tradition. Being a TWA flight attendant is an exciting and rewarding job, and the long service of many of our flight attendants shows what a fulfilling career it can be. But TWA today faces a host of new problems that our flight attendants must help us solve.

With the removal of government regulations controlling airline routes and fares, the major established airlines have been challenged in virtually every market by newly formed low-cost carriers. Not burdened with contracts negotiated when the industry was insulated from competitive forces, the new carriers' lower

labor costs enable them to charge lower fares. The only way for major airlines like TWA to meet this competitive challenge is to bring their payroll costs into line.

As early as 1981, TWA began an effort to reduce its labor costs. Management and non-management employees (including pilots and others employed under labor contracts) began making necessary concessions through wage freezes and wage reductions. However, IFFA, which has obtained contract increases compounding to 40.1% since 1981, declined to participate.

This past summer, in an unusual and innovative move, the Air Line Pilots Association (ALPA) and the International Association of Machinists (IAM), representing TWA's pilots and mechanics, respectively, approached Mr. Carl C. Icahn, who had become TWA's largest stockholder, and negotiated agreements enabling Mr. Icahn to defeat an effort by Texas Air Corporation to acquire TWA. ALPA and IAM agreed to enter into labor contracts with TWA providing substantial reductions in wages and benefits, in exchange for equity and profit-sharing in the new TWA. IFFA was asked by both Mr. Icahn and the other unions to join in this effort, but again IFFA declined to participate.

TWA's pilots have made the largest contribution to the current cost-reduction effort. Beyond the wage reduction and increase deferral negotiated in 1984, ALPA has now agreed to a 26% wage reduction in aggregate pilot pay and benefit costs, on top of the rollback of a 4% wage increase which became effective June 30, 1985. ALPA's action makes TWA's pilot pay and benefit levels more comparable with the industry and TWA's flight attendants are also being asked to bring their pay and benefit levels more in line with competitive industry conditions.

We hope to succeed in negotiating a mutually satisfactory agreement with IFFA covering these matters, so that we can move vigorously ahead. However, if a failure of the bargaining process results in a strike, we must be prepard to maintain normal flight operations by augmenting our flight attendant workforce promptly with new hires. That's why you're the target of IFFA's present picketing.

IFFA's literature tells you that you have a legal right not to cross an IFFA picket line if it calls a strike -- and that's certainly true. What is not true, however, is IFFA's promise that you will eventually have a job at TWA if you do decide to honor an IFFA picket line. No one can make such a promise.

Under the law, TWA would be free to hire replacements for any or all strikers -- and you can be assured TWA would hire qualified Travel College graduates to keep the airline operating. In addition, after a strike ends, TWA would be legally free to retain in its employ those hired during the strike. Again, you can be assured that TWA would continue to employ those hired during the strike.

But here's why IFFA's promise of a job if you honor its picket line is a false one. Suppose there's a strike in which 3000 of the 7000 current flight attendants either continue or return to work, and the Company hires 4000 new employees as replacements for those who don't. The 4000 who've been replaced do not have a right to get their jobs back when the strike is over, but they do have a right to be recalled as vacancies occur thereafter.

That means that after the strike is over, any new flight attendants hired during the strike who decided not to come to work because of the IFFA picket line, would later be standing in line waiting for recall along with 4000 more experienced flight attendants. On the other hand, any newly hired flight attendants who continue to work through the strike will not be replaced after the strike is over. IFFA's promise that "you'd be among the first recalled" is nothing but a sham.

We hope you'll consider these facts as you proceed through the Travel College program. We do expect that many of you will be joining us as flight attendants in the future, but we don't want to fill you with false hopes or empty promises.

Attached are questions that trainees have been asking most frequently along with our answers. If you have any other questions

about this message or other information that comes to your attention on this subject, please submit them in the question box on the 6th floor bulletin board. Answers will be posted.

Sincerely,

/s/ WILLIAM S. BORDEN
William S. Borden

• • •

QUESTION: IFFA SAYS THAT I HAVE A RIGHT TO JOIN THE PICKET LINE, AND THAT I WILL HAVE SENIORITY FROM THE DAY I AM ASKED TO REPORT FOR WORK. IS THAT TRUE?

ANSWER: IT IS TRUE THAT YOU (OR ANYONE ELSE FOR THAT MATTER) CAN JOIN A PICKET LINE. BUT IT IS NOT TRUE THAT YOU AUTOMATICALLY HAVE SENIORITY FROM THE DAY YOU ARE ASKED TO REPORT FOR WORK. IN ORDER TO GET ON THE TWA FLIGHT ATTENDANT SENIORITY LIST, YOU HAVE TO FIRST BECOME AN EMPLOYEE OF TWA, AND YOU DON'T BECOME AN EMPLOYEE BY JOINING A PICKET LINE.

QUESTION: IF I CROSS A PICKET LINE TO COME TO WORK, CAN THE UNION PENALIZE ME?

ANSWER: UNDER THE UNION'S CONSTITUTION AND BY-LAWS, THE UNION RESERVES THE RIGHT TO FINE MEMBERS. IT HAS NO POWER TO FINE OR OTHERWISE PENALIZE PEOPLE WHO ARE NOT MEMBERS. TWA'S CURRENT LABOR AGREEMENT WITH IFFA REQUIRES NEWLY-HIRED FLIGHT ATTENDANTS TO JOIN THE UNION (OR COMMENCE PAYING UNION DUES AND THE INITIATION FEE) WITHIN 60 DAYS OF EMPLOYMENT. UNTIL THE 60 DAYS ARE UP YOU HAVE NO OBLIGATION TO JOIN. IN ADDITION, IF THERE IS A STRIKE, THERE WOULD BE NO OBLIGATION OF ANY KIND TO JOIN THE UNION UNTIL THE STRIKE WAS SETTLED. WHETHER YOU JOIN THE UNION BEFORE 60 DAYS ARE UP, OR DURING A

STRIKE, IS A PERSONAL DECISION FOR YOU TO MAKE. TWA WILL TREAT YOU THE SAME WAY REGARDLESS OF WHETHER OR NOT YOU JOIN THE UNION DURING THESE PERIODS.

QUESTION: IF I CROSS A PICKET LINE TO COME TO WORK, AND THEN THE STRIKE IS SETTLED, CAN THE UNION TAKE ACTION AGAINST ME OR REFUSE TO ACCEPT MY APPLICATION FOR MEMBERSHIP AT THE END OF THE STRIKE.

ANSWER: THE UNION CANNOT AFFECT YOUR JOB AT TWA AT ALL. YOU WOULD CONTINUE TO HAVE YOUR JOB, YOUR SENIORITY RIGHTS AND ALL OTHER BENEFITS PROVIDED BY TWA TO ITS FLIGHT ATTENDANTS. IF THE UNION WERE TO DENY YOUR ADMISSION TO UNION MEMBERSHIP, IT WOULD ONLY AFFECT THINGS LIKE YOUR RIGHT TO VOTE IN UNION ELECTIONS.

QUESTION: IF A STRIKE OCCURS AND IS SETTLED, CAN I BE "BLACKBALLED" FROM THE INDUSTRY IF I CROSS THE PICKET LINES?

ANSWER: ALL U.S. AIRLINES HIRE THEIR OWN FLIGHT ATTENDANTS. THE UNIONS DO NOT DO THE HIRING. NO MAJOR CARRIER HAS ANY AGREEMENT WITH THEIR FLIGHT ATTENDANTS' UNION THAT GIVES THE UNION ANY SAY IN WHO IS HIRED, NOR ARE WE AWARE OF ANY U.S. CARRIER THAT WOULD HAVE SUCH AN AGREEMENT WITH ITS UNION. SINCE UNIONS HAVE NO SAY IN WHO IS HIRED AS A FLIGHT ATTENDANT, THEN THERE IS NO WAY FOR HIRING "BLACKBALL" TO OCCUR.

QUESTION: WHERE WILL I STAND WITH TWA AFTER A STRIKE IS SETTLED IF I CROSS PICKET LINES TO COME TO WORK?

ANSWER: AS WE SAID BEFORE, TWA WOULD BE LEGALLY FREE TO RETAIN IN ITS EMPLOY THOSE FLIGHT ATTENDANTS HIRED DURING THE STRIKE AND TWA HAS MADE A COMMITMENT TO DO SO.

THOSE FLIGHT ATTENDANTS WHO DIDN'T COME TO WORK DURING A STRIKE WOULD NOT HAVE A RIGHT TO GET THEIR JOBS BACK, BUT WOULD HAVE THE RIGHT TO BE REINSTATED ONLY IF AND WHEN VACANCIES OCCUR. THUS, THE STRIKING FLIGHT ATTENDANTS WOULD HAVE NO RIGHT TO "BUMP" THOSE HIRED PRIOR TO OR DURING THE STRIKE WHO CONTINUED TO COME TO WORK.

Exhibit B-13 (February 13, 1986 letter from W.S. Borden to all flight attendants, with attachment)

[Letterhead of TWA]

February 13, 1986

Dear Flight Attendant:

The National Mediation Board has declared an impasse in negotiations for a new Agreement between TWA and IFFA, and has commenced the mandatory thirty day "cooling-off" period. This period will expire at midnight, March 6, 1986. At that time, both parties will be free of the obligation to maintain the status quo: the union will be free to strike, and the Company will be free to implement the changes it has proposed in your conditions of employment. Thus, it is possible that a strike could occur at 0001 on March 7, 1986.

The Company does not want a strike and will do everything possible to reach an agreement prior to March 7, 1986. While we do not wish a strike you should be aware that if there is a strike TWA Will Continue to Operate.

If you choose to report for work, information concerning pay and benefit levels and work rule revisions which will be effective on March 7, 1986, shall be posted at all flight attendant domiciles. If you do not report for work, the Company is permitted under the law to hire "permanent" replacements for striking employees. We plan to exercise this right, if necessary, in order to continue flight operations.

Should the current negotiations fail to produce an agreement, you will be called upon to make one of the most important decisions of your professional life -- whether to continue to work, or to strike.

The attached information contains responses to questions I have received from flight attendants regarding this important

decision. I have attempted to provide you with information you will need during your deliberations.

Sincerely,

/s/ WILLIAM S. BORDEN
William S. Borden

QUESTION: If the Union calls a strike at the end of the "cooling-off" period, will I be permitted to continue to work?

ANSWER: Yes. TWA will continue its flight operations if the Union calls a strike, and all flight attendants who wish to continue to work will be able to do so. Working flight attendants will continue to draw salary (at the newly posted rates), receive benefit coverages and retain job security protections.

QUESTION: Who will be working as flight attendants during the strike?

ANSWER: TWA plans to draw from several sources for its flight attendants during the strike. First are the flight attendants who continue to work. Second are newly-hired flight attendants who have graduated from the Trans World Travel College. (There will be more than 1500 Travel College graduates available by the end of February.) Third are newly-hired flight attendants who presently work for other airlines or who were recently furloughed from other airlines. Fourth are supervisory and other TWA employees and others who have been trained to work as temporary flight attendants. All those serving as flight attendants during the strike will be fully safety-trained.

QUESTION: If I decide to strike, will there be a flight attendant's job for me at TWA when the strike ends?

ANSWER: TWA has made a commitment that any newly hired flight attendants who continue to work during the strike will not be furloughed or displaced to make room for returning strikers. Returning strikers will be given the opportunity to fill vacancies in the various domiciles as they occur. If TWA hires 3000 new flight attendants

during the strike, it can be expected that about 3000 strikers will not have jobs when the strike ends. Those who don't have jobs at the end of the strike will be put on a preferential hiring list to fill future vacancies as they may occur.

QUESTION: Will seniority be used in deciding which returning strikers receive offers to fill job vacancies as they occur?

ANSWER: No. Seniority will not be a factor. Returning strikers will be offered jobs on a first come, first served basis, based on the day on which the returning striker made an unconditional offer to return to work. TWA plans to maintain a single system-wide rehiring list. For each day, a lottery will be used to determine the order in which the strikers who offered to return on that day are put on the rehiring list. Then, as vacancies occur, they will be offered to returning strikers from this system-wide rehiring list.

QUESTION: How will flight attendants be assigned to domiciles during the strike?

ANSWER: In order to operate efficiently during the strike, TWA will fill permanent domicile vacancies created by the strike based on the transfer requests (bids) of working flight attendants. The same will be the case as to bids for service manager vacancies. As an example: if, due to the strike TWA has insufficient flight attendants at LAX-D, TWA will fill vacancies by awarding transfers in seniority order from the bids of the working flight attendants. Any transfers so awarded will remain effective after the strike is over.

QUESTION: During the strike, when will transfer requests for permanent vacancies in domiciles and service manager positions be awarded?

ANSWER: As soon as the Company determines how many vacancies have been created by the strike (probably within 48 to 72 hours). The Company will award transfer requests for those vacancies from the bids of working flight attendants. Thereafter, transfer requests for vacancies will be awarded as frequently as operations warrant.

QUESTION: Will returning strikers be offered positions in their last domicile?

ANSWER: Not necessarily. Returning strikers will be offered a position at whichever domiciles have vacancies when they offer to return. That may or may not be the flight attendant's last domicile.

QUESTION: If I decide to go out on strike and then decide I want to return to work, how do I make an unconditional offer to return to work?

ANSWER: An unconditional offer to return to work must be made in person. To do so, you must appear at the office of the General Manager/Manager In-Flight Services at any TWA flight attendant domicile. When you so appear, you must be prepared to return to work immediately and be able to accept immediate assignment. You will receive further instructions/information at the time that you appear and offer to return to work.

Exhibit B-15 (February 28, 1986 letter from W.S. Borden to all flight attendants, with excerpts from attachment)

[Letterhead of TWA]

February 28, 1986

Dear Flight Attendant:

While negotiations are scheduled to resume March 1, a strike commencing 0001, March 7th, remains a distinct possibility. Those of you who intend to continue to work must observe the following instructions.

If there is a strike, you can no longer be assured of your monthly bid. If you intend to work, you will need to appear in person at the office of any General Manager - In-Flight Services/Manager - Flight Attendants, to advise that you have not withdrawn your services.

1. If you arrive back at domicile prior to March 7, you must appear at any General Manager - In-Flight Services/Manager - Flight Attendants office between 0700-1200 local domicile time on March 7.
2. If you are on layover on March 7, you should contact the Captain and/or loca' station operations.
3. If your assignment brings you back to domicile on March 7 or later, you must appear at any General Manager - In-Flight Services/Manager - Flight Attendants office no later than Noon local domicile time the following day.

When you appear at the office of the General Manager - In-Flight Services or Manager - Flight Attendants, you will receive instructions concerning your flight assignment. You should be ready to fly, having with you your uniform, EPH, In-Flight Service Manual, flashlight and passport. Your assignment will not start, however, until you've completed required rest.

My letters of February 13 and 20, 1986, have generated more questions and the answers are attached. I hope that they will assist you in making your decision.

Continue to ask questions of both TWA and IFFA. It is important that you hear from both sides.

Sincerely,

/s/ WILLIAM S. BORDEN
William S. Borden

* * *

Question #8

Can I be permanently replaced if I choose not to work during a strike?

Answer:

Yes. For example, if TWA hires 3,000 new flight attendants during the strike, it can be expected that about 3,000 strikers will not have jobs when the strike ends. Those who don't have jobs at the end of the strike will be put on a preferential hiring list to fill future vacancies as they may occur.

Question #9

Will seniority be used in deciding which returning strikers receive offers to fill job vacancies as they occur?

Answer:

No. Seniority will not be a factor. Returning strikers will be offered jobs on a first come, first served basis, based on the day on which the returning striker made an unconditional offer to return to work. TWA plans to maintain a single system-wide rehiring list. For each day, a lottery will be used to determine the order in which the strikers who offered to return on that day are put on the rehiring list. Then, as vacancies occur, they will be offered to returning strikers from this system-wide rehiring list.

* * *

Exhibit B-16 (March 1, 1986 letter from C. Icahn to all TWA employees, with attachment)

[Letterhead of TWA]

March 1, 1986

Dear TWA Employee:

When I assumed the Chairmanship of TWA on January 3, the company had approximately $50 million in cash and was about to post the worst loss in its history -- $193 million -- for 1985. Since that time, we have borrowed $550 million, thus avoiding a cash crunch, and, as you know, last week we made a marketing agreement with Piedmont and an acquisition agreement for Ozark. In taking these steps, TWA has made great strides in the right direction. In fact, in the case of Ozark, I'm proud to say TWA has achieved one of its most important long-term goals. However, TWA is far from out of the woods, and the first quarter promises to be a real "character builder," with projected losses of $125 million. Bookings to Europe are down, fare wars abound and airline industry capacity continues to increase.

When I became Chairman, I told you I would do everything I could to make TWA great again, but as I said, I need your cooperation and support. Most of you are doing everything you can and I appreciate that. Everyone except the flight attendants has made important financial sacrifices, and I have committed that those of you who have done so will not be asked for further reductions in 1986.

On the other hand, IFFA, which has received increases totaling more than 40% over the last five years, has refused to offer more than a 15% reduction in pay. We have asked for a 22% pay reduction and work rule changes reflecting less than two hours of added productivity per week -- changes that would still put our flight attendants above the industry average. It is

imperative that we achieve meaningful concessions if we are to survive. We are compelled to take a firm position in our negotiations with IFFA because we must achieve our common goal of profitability. I urge IFFA to respond with the kind of substantial commitment TWA needs.

Sincerely,

/s/ CARL ICAHN
Carl C. Icahn
Chairman

P.S. You may be interested in my responses to questions asked during a CBS press interview resulting from the events of this past week. On the reverse side of this letter are some pertinent excerpts.

PERTINENT EXCERPTS FROM A CBS PRESS INTERVIEW WITH CARL ICAHN

Q. Is TWA prepared for a strike?

A. We now have trained and ready to be hired 1,500 new flight attendants. We have another 1,500 people qualified to go in temporarily. With the new work rules, we need only 3,500 flight attendants to operate the airline until June and by then we will have many more trained -- so we're pretty well ready for March 7th. We hope there won't be a strike, we'd like there not to be a strike, but if there is, we'll be ready to fly. And, unfortunately, if there is a strike, we probably won't have jobs for many of the strikers when the dispute is finally resolved.

Q. What if other employee groups support IFFA, with the result that their strike is successful?

A. I don't think that will happen because it's a no-win situation. The flight attendants would be pushing us to do something we don't want to do -- which is to disassemble the airline. This is something that I just don't want to do and I hope we don't have to do it. But our airline is worth a heck of a lot of money and some say it's worth more broken up than as a whole. We have planes that are worth a lot, we have the PARS system that's worth a lot, we have routes that are worth a lot -- but we don't want to disassemble it.

Exhibit B-20 (March 14, 1986 letter from C. Icahn to all flight attendants)

[Letterhead of TWA]

March 14, 1986

Dear TWA Flight Attendant:

I've received many letters from striking flight attendants telling me they're confused, or even frightened, by the statements they've been hearing or receiving directly from your union. I'd like to clear up a few points about which there may be some misunderstanding.

. The union says it will fine you if you cross the picket line and come back to work. It's true they have the power to fine their members, but they cannot fine you if before you return to work you resign from the union. That choice, of course, is entirely yours to make; if you do, and the union still threatens you with fines for working, we would regard that as an improper interference with our operations and provide you with legal counsel, if you request it. (Call In-Flight Services for help.) If the strike ends and a new contract is signed with the same union seniority clause as in the old one, you would have to reapply for membership, but even if you were denied readmission, it would in no way affect your employment with TWA -- you would still retain your job, your seniority rights and all benefits.

. If you come back to work now and there's a subsequent settlement, the union says you'll be displaced because you worked. There was nothing in the old agreement which would have allowed that to happen, and we don't intend to let any new agreement permit such unfair action.

. The union doubts the growing level of our operations -- they say we're "a shambles" and we can't be flying more than 20% of our schedule. Long before the strike began, we prepared a contingency plan to build back our service from an initial level

of about 50% to full operation in about 10 days. We're currently right on target. (See the enclosed performance summary.) As of Saturday, we'll be serving every city on our domestic system and all our overseas destinations. The daily figures we've been putting out haven't been pipe dreams or wishful thinking -- they're verifiable fact. The media may report the union's skeptical comments, but traffic controllers at airports across our system confirm that we're not "combining flight numbers" or doing it with mirrors, we're really flying all those planes and people -- more each day. We're already at three quarters of our normal capacity and by the middle of next week our schedule will be totally restored. If anyone doubts it, we stand ready to back up our claims with hard data before any independent authority the union might select.

. The union claims our new work rules mean you'll be forced to work unreasonably long hours and be away from home an unacceptable length of time. The fact is that if you work 80 hard hours a month under our new rules, you'll be away from home an average of 220 hours, or 9.2 24-hour periods -- vs. 7.3 under your old contract. I don't call that onerous at all -- and, apparently, neither do the some 1500 new flight attendants now on the job or in training.

As happy as I am to see those people coming to work for us in our time of need, I genuinely feel it would be tragic for them to permanently replace any veteran TWA flight attendant who sincerely wants to work for our airline -- especially if that should happen through any misunderstanding of the true situation. It's because I have no desire to see innocent people hurt in this dispute that I want to put these facts clearly on record for you, while there's still time for you to act in your own interest.

. You should know, for example, that IFFA declined to make payment of the premium on your group medical, dental, accident and life insurance, and that we cannot continue your coverages unless you return to work.

. You should also know that when we offered a buy-out program, we warned your leadership that a strike that could cost us $40 million or more would prevent us from maintaining such an

offer past the deadline, but we said we'd be willing to hold it open so that IFFA -- which always stresses the fact that these matters are "your choice" -- could give you a democratic opportunity to vote on our last offer, including a 17% instead of a 22% pay cut, plus the buy-out package . . . but they refused.

. We continue to be willing to negotiate, and hope IFFA will reach agreement with us soon. But it's important for you to understand clearly that, at the rate of two classes a day, every day, we continue to train and hire new flight attendants on a permanent basis. Far from "waiting in hideaway hotels for their first flying assignment because [our] flights aren't operating" (as the union would have you believe), they're in the air and on the job. As their numbers steadily grow, and with more productive new work rules that already require hundreds fewer in our peak-level work force, a progressively shrinking number of job openings will be available to you.

That's not "rhetoric" or an idle threat; it's a fact that could well determine your future with TWA.

This time, it really is your choice.

Very truly yours,

/s/ CARL ICAHN
Carl C. Icahn

Exhibit B-22 (March 17, 1986 mailgram from C. Icahn to all flight attendants)

[Mailgram]

DEAR TWA FLIGHT ATTENDANT:

WE ARE REQUIRED TO SEND YOU THE FOLLOWING INFORMATION CONCERNING A CHANGE OF DOMICILE RULES, A CHANGE ABOUT WHICH IFFA HAS NOT INFORMED YOU.

EFFECTIVE MARCH 21, TRANSFERS WILL BE AWARDED TO FILL FLIGHT SERVICE MANAGER AND CABIN ATTENDANT VACANCIES THROUGHOUT THE TWA SYSTEM. ONLY ACTIVE FLIGHT ATTENDANTS WITH A TRANSFER REQUEST OR TELEGRAM ON FILE RECEIVED AT TWA HEADQUARTERS, 605 THIRD AVENUE, NEW YORK, BY 5 P.M. (EST) THURSDAY, MARCH 20, WILL BE ELIGIBLE FOR TRANSFER. VACANCIES STILL EXISTING AFTER THE TRANSFER WILL BE ASSIGNED TO NEW HIRES. FOR YOUR INFORMATION, FOR APRIL 1986 ONLY 67 MORE CABIN ATTENDANTS ARE REQUIRED AT SAN FRANCISCO AND 123 MORE FOR LOS ANGELES. THESE ARE ALL EXPECTED TO BE FILLED BY MARCH 21.

WHAT IFFA HAS BEEN TELLING YOU ABOUT IS A MAJOR LAWSUIT AGAINST THE COMPANY THAT WOULD END THE STRIKE THIS WEEK AND FORCE THE COMPANY TO TAKE EVERYONE BACK TO WORK. TWA HAS BELIEVED ALL ALONG THAT THE CASE HAD NO MERIT. YOU SHOULD BE AWARE THAT TODAY IFFA ABANDONED ITS MOTION FOR AN IMMEDIATE INJUNCTION AND REQUESTED A POSTPONEMENT. IFFA WILL NO DOUBT ASK YOU TO WAIT FOR THREE TO FOUR WEEKS WHILE IT PREPARES A

NEW LAWSUIT. HOWEVER, BY THEN THERE WILL BE ANOTHER THOUSAND NEW FLIGHT ATTENDANTS TRAINED AND ON THE JOB.

HERE ARE THE FACTS ABOUT A NUMBER OF OTHER MISSTATEMENTS IFFA HAS MADE OVER THE PAST SEVERAL DAYS:

IFFA SAYS WE CAN'T FLY A FRACTION OF OUR SCHEDULE.
FACT: BY SUNDAY WE WERE FLYING 100% OF OUR INTERNATIONAL SCHEDULE, 75% OF OUR DOMESTIC FLIGHTS AND 85% OF OUR AVAILABLE SEAT MILES (SEATING CAPACITY).

IFFA SAYS OUR FLIGHTS ARE "GOING OUT EMPTY."
FACT: OUR LOAD FACTORS ON MARCH 15 WERE 71% INTERNATIONAL, 65% DOMESTIC.

IFFA SAYS OUR NEW WORK RULES WILL MEAN TOO LITTLE REST TIME AND UNSAFE OPERATIONS.
FACT: NOT ONLY ARE THE NEW HIRES FLYING OUR NEW RULES SUCCESSFULLY, FLIGHT ATTENDANTS AT OTHER AIRLINES HAVE BEEN FLYING SIMILAR RULES FOR SOME TIME.

IFFA SAYS YOU WILL HAVE TO BE AWAY FROM HOME 320 HOURS A MONTH UNDER THE NEW WORK RULES.
FACT: THE NEW WORK RULES WILL REQUIRE THE AVERAGE FLIGHT ATTENDANT TO BE AWAY 220 HOURS A MONTH VS. A PREVIOUS AVERAGE OF 175 HOURS PER MONTH.

IFFA SAYS THE FAA IS QUESTIONING OUR OPERATION BECAUSE OF SAFETY VIOLATIONS.
FACT: THE FAA HAS CHECKED US OUT FROM DAY ONE AND THEY GAVE US A CLEAN BILL OF HEALTH.

IFFA SAYS IT WILL FINE OR DISCIPLINE YOU IF YOU CROSS THE PICKET LINE AND RETURN TO WORK.

FACT: IFFA CAN'T DISCIPLINE YOU IF YOU RESIGN. IF IT TRIES TO FINE YOU, AFTER YOU RESIGN, WE'LL GIVE YOU LEGAL COUNSEL. IF IT WON'T TAKE YOU BACK, YOU'LL STILL RETAIN YOUR JOB, FULL SENIORITY AND ALL BENEFITS. WE GUARANTEE YOU IF YOU CHOOSE TO WORK THROUGHOUT THE REMAINDER OF THE STRIKE YOU WILL NOT BE FURLOUGHED WHEN THE STRIKE IS OVER IN ORDER TO MAKE ROOM FOR A RETURNING STRIKER.

IFFA SAYS OUR NEW HIRES ARE "WAITING IN HIDEAWAY HOTELS FOR THEIR FIRST ASSIGNMENTS," BECAUSE WE CAN'T FLY ENOUGH TO USE THEM.
FACT: THERE ARE NOW 1600 ON THE PAYROLL, WITH MORE IN TRAINING EACH DAY, AND THEY'RE ALL BEING PUT TO GOOD USE.

IFFA SAYS "ALL JOBS WILL BE GUARANTEED" WHEN A SETTLEMENT IS REACHED.
FACT: WITH OUR NEW WORK RULES, IN THE PEAK SEASON WE'LL NEED ONLY 5,000 FLIGHT ATTENDANTS TO RUN THE AIRLINE. WITH 1600 NEW HIRES NOW ON THE PAYROLL (NOT COUNTING THE CONTINGENT WORK FORCE OF 1500), EVEN IF EVERYONE WANTED TO COME BACK, WE WOULD ONLY NEED LESS THAN 3500 OUT OF THE ORIGINAL FLIGHT ATTENDANT WORK FORCE OF 6500.

THE CHOICE IS YOURS.

CARL ICAHN

23:45 EST

MGMCOMP

Excerpt from Exhibit B-23 (January 2, 1986 letter from IFFA to flight attendants)

[Letterhead of IFFA]

January 2, 1986

RE: Contract Negotiations

Dear

It certainly looks like you've been keeping track of the issues. Let me take a shot at giving you some answers.

1. Will we strike in event the Company's last offer is a total of 20% concessions?

(A) My goal and the goal of the Negotiating Committee is to ensure that we concede as little as possible. At this point, we have offered to match the IAM concession. We are not unreasonable nor are we stupid. At this point I can't tell you what Icahn/TWA's position will be in the final hours nor can I tell you what our position will be. Those things will develop as the course of our negotiations continue. I can't give you a more direct answer than that at this point in time. It will really be a matter of determining, after taking into consideration whatever external factors may be influencing us at the time, what the Flight Attendants are willing to do.

2. Will we accept vacation give back?

(A) Possibly.

3. Can we send memo explaining differences between TWA and Continental?

(A) Yes. Good idea.

4. What will Flight Attendant pay scale be like in the event of a strike if Flight Attendants cross the picket line?

(A) First of all, their legs will be broken so they won't be able to cross the line. No, seriously, there is no way to tell. Once the parties are released to self-help, at the end of a thirty-day count down, the Company is free to unilaterally impose whatever wages and work rules they desire. One of their most likely choices would be to impose those demands that they have on the table at the conclusion of the count down. That would mean, if the demand was for a 22% wage cut with . . . .

• • •

Exhibit B-24 (March 29, 1986 letter from C. Icahn to flight attendants)

[Letterhead of TWA]

March 29, 1986

Dear TWA Flight Attendant:

First I want to express my sincere appreciation for the superb job our newly hired and other working flight attendants are performing under somewhat trying circumstances. TWA has received numerous compliments from its passengers as to the courteous, attentive and cheerful service being provided by our flight attendants during the strike. Nothing can be more effective in building our passenger loyalty to TWA than service that generates that kind of response from our passengers.

I also want you to know how pleased I am at the cool, calm and professional way our working flight attendants have handled the strikers' harassment tactics. Unfortunately, this form of activity seems to be a part of every strike, and is likely to continue for some time as those remaining on the picket lines see more of their fellow flight attendants returning to work. For our part, we are making every effort to provide appropriate security arrangements wherever needed. Please continue to report any harassment incidents to your supervisors so that TWA can take proper action.

Finally, I have heard that IFFA continues to threaten newly hired and other working flight attendants by indicating that they will lose their jobs when the strike is settled unless they cease working and join the picket line. This threat is so empty that I am surprised that the IFFA persists in making it. Let me reassure you in writing as Bill Borden and I have previously stated publicly, that if and when a settlement is reached, under

no circumstances will newly hired or other working flight attendants be furloughed to make room for returning strikers. This is a personal commitment from me that you can absolutely count on.

Sincerely,

/s/CARL ICAHN
Carl C. Icahn
Chairman

Exhibit B-25 (April 15, 1986 letter from J.W. Hoar)

[Letterhead of TWA]

April 15, 1986

On behalf of Mr. Icahn, let me respond to your recent phone call.

First, we are encouraged that you are seriously considering crossing the picket line and returning to work. More than 700 of your fellow Flight Attendants have already made that prudent decision and are in great part responsible for the Company's successful continuation of operations during the strike.

Second, let me repeat Carl Icahn's earlier assurance, that if and when a contract settlement is reached, under no circumstances will newly hired or other working Flight Attendants be furloughed to make room for returning strikers. When you again become an active employee, this commitment is to you.

Very truly yours,

J.W. Hoar
Vice-President
Labor Relations

Exhibit B-26 (April 15, 1986 letter from J.W. Hoar)

[Letterhead of TWA]

April 15, 1986

On behalf of Mr. Icahn, let me respond to your recent phone call.

First of all, welcome back to work. Along with over 700 of your fellow Flight Attendants, you've made the difficult but prudent decision to return as an active employee. In-Flight Services management at JFK are, of course, available to assist you as needed. Should you be exposed to any harassment, please report it to your supervisors so that TWA can take proper action.

Let me repeat Carl Icahn's earlier assurance, that if and when a contract settlement is reached, under no circumstances will newly hired or other working Flight Attendants be furloughed to make room for returning strikers. People like yourself are an important part of TWA's successful continuation of operations.

Very truly yours,

J.W. Hoar
Vice-President
Labor Relations

Exhibit B-27 (April 1986 letter from an incumbent flight attendant)

I am returning to my job as a TWA Flight Attendant. This has probably been the most difficult decision I have ever been faced with, but it has not been made lightly or without a great deal of intense investigation and thought.

I am not, nor have I ever been, either particularly pro (as in union) or anti (as in management) anything. I am aware of the fact that the union has protected my interests and helped provide me with an above average standard of living. Likewise, I am aware that the company has been a party to this arrangement and that every couple of weeks they send me a decent paycheck to do a job I really enjoy.

From the beginning of the strike I have supported the union's position. I have worked all my assigned picketing duties (including the 0100-0500 shift at cargo). This was done in spite of my doctors warning that my four week cold could become pneumonia. I have attended rallies and blocked trucks from crossing our line.

I have also come to the conclusion that what I want to do is to be a Flight Attendant. While my support of the job action has been genuine, so has my desire to see the matter resolved, with as little bloodshed as possible and with people, especially good friends of mine, not being hurt.

It would have been easy to sit back quietly, believe everything I was being told from both sides, union and management, and hope that we won. However, enough questions came to light very quickly that I found myself in the role of Sherlock Holmes. The first thing I discovered is that the truth is a difficult thing to discover. Union representatives invariably responded by saying "I don't know." TWA personnel at Employee Benefits office

were even less helpful. It became apparent that independent verification was necessary.

Due to an above average amount of family medical bills, my first concern was related to our medical coverage. I knew that it was to be cancelled effective the first day of the strike and that we would be offered the right to convert to an individual policy. Neither the union nor the company was able to give me any details so I contacted CIGNA. To my great concern I discovered that:

a. the policy we would be offered would not be as good as the one we had;

b. the premium would be almost three times what it was as a group policy;

c. the deductible would start all over;

d. Of greatest importance, IFFA was offered the right (which they refused) to pick up the policy under the terms and conditions as they previously existed.

I uderstand that the union probably did not have the funds to pay the premium. However, its members probably did and certainly should have been offered the option. It does not take a mathematical genius to conclude that a policy with a premium of $138 per month is preferable to an inferior one with a premium of approximately $330 per month. If we wished to reject this possibility, so be it, but why weren't we told or rather asked?

My spirits were soon bolstered, however, when the union informed me that the FAA has closed the TWA Training Facility in Kansas City because new hires were not being properly trained. Since my position with the company was no longer to be threatened with an ever increasing number of replacements, who Mr. Icahn stated, would remain with the company, I breathed a good deal easier.

However, I am married to a natural skeptic and my husband mentioned that if this was true, why had none of the newspapers picked up the story. Operating under the same "horses

mouth" theory, he decided to go to the source. He made almost a dozen calls to the FAA before he got to the right person, but when he did he was told that not only was the training facility not closed, but they were graduating 100-200 people a week. He immediately called strike headquarters and asked if the FAA had closed the training facility. Their response was -- absolutely. It is closed. (Incidentally, if there is a question in anyones mind about the veracity of any statement I have made, or will make, I have names, dates, times and telephone numbers.)

Whatever easier breathing I was now doing was suddenly gone and I felt my chest tightening. I expect my union to represent me with every weapon in their legal arsenal, but I also expect them to tell me the truth.

There was one other area where I became aware of being provided with false information. That is the area of load factors and dual flight numbers. When picketing on March 18, I personally saw a commissary manifest. The figures indicated load factors of 75% and no dual flight numbers, with the majority of flights operating. This information was provided to a strike captain who promised it would be turned in. If it was, the information was never passed along to inquiring strikers. I continued to be told such things as 30% load factors, multiple incidents of dual flight numbers, etc.

On Thursday evening, March 20, I attended a rally in the town in which I live. My husband met me there. I previously described him as a skeptic. He also believes there is no harm in trying anything and he told me he had just gotten off the telephone, having spent 45 minutes talking with Carl Icahn. It was my turn to be a skeptic. I asked if he were serious and, if so, how was he able to do that. His answer, perhaps absurd in its simplicity, but nevertheless true, was that he simply picked up the telephone and called him.

He related the conversation to me and while he said it included a degree of expectable rhetoric (much the same as the union correspondence) several important facts came out:

a. Mr. Icahn made it quite plain that he had a responsibility to his investors and stockholders and that he fully intended to meet that responsibility and to keep his word.

b. He was a bit incredulous that IFFA did not take the final management offer and take it to the membership for for a vote. He indicated that he would have expected them to do so with their (the union negotiators) recommendation that we vote it down. However, in the meantime, he would not have been able (due to a great deal of outside pressure) to implement anything and that until the vote was in (2 to 3 weeks) we would all have been working under the old contract (no pay cuts, no change in working conditions). If we would accept, there would have been no new hires to worry about. If we rejected it, we would have begun our strike in better weather and at a time increasingly closer to TWA's peak period, a time when our presence becomes of greater and greater importance.

This particular topic brought up something that had been bothering me for days. I had received a copy of the company's "final" proposal, but had never been permitted to vote on it. While I would have been prepared to follow the dictates of the majority of the membership, I don't think that the ability of that membership to express their point of view should be removed. I had begun to feel (and that feeling increased) disenfranchised.

The rally I attended on the night of March 20 began with a group of United pilots explaining that they nad been through this before and that if we were strong and united (no pun intended) we would win. Mine was not the only eyebrow raised -- it is a heck of a lot more difficult to find new hire pilots than it is new hire Flight Attendants.

We were then told to act with dignity, only to have the company and its management described in terms that, at best, might be

called mocking. So much for dignity. Again, I was not the only one squirming.

I was then insulted by someone who stood up with charts and graphs that explained that a 22% change in working conditions would mean that I would be earning 44% less in salary. I may not love having to work harder or more hours, but to state that a change in working conditions cuts my pay shows a total lack of respect for both the truth and my intelligence.

By the time the rally was over I was concerned -- for myself, my friends, our jobs and our company. I was suffering a severe crisis of confidence in how things were being conducted and began to realize that it was becoming more than a possibility that I was in a war where the battle might be won (with terrible injuries inflicted), but the war lost.

The next day I decided to test my husband's theory and I tried to call Mr. Icahn. Within a minute he and I were engaged in a conversation (in a way I found this disturbing, since my attempts to deal with any knowledgeable union person has proven impossible).

Mr. Icahn, while being polite and certainly not acting like an ogre, pulled no punches. He stated that he was a businessman and that just because previous management did a lousy job running the airline, it certainly did not mean that he was going to do the same. He stated that he intends to run the airline at a profit or sell it. He did not threaten -- he simply stated his intentions -- and I must say I believe him.

I have come to the conclusion that as each day goes by, as more new hires join the company and as more and more people cross the picket line, the likelihood of my having the job I want would become less and less likely.

Is this the way I would like it to be -- of course not. Am I sure I am right -- no.

However, when all is said and done I have put everything I know and have been told out on a table and examined the pic-

ture. It's not nearly as pretty as I would like it to be, but I'm watching the pieces being chipped away.

I am prepared to live with my decision and to respect the opinions of those who disagree. I certainly hope they show the same ability and respect.

New York Domestic

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-8

Exhibit 1 to the Affidavit of J.W. Hoar, filed August 29, 1986, in Opposition to IFFA's Motion for Partial Summary Judgment and in Support of TWA's Cross-Motion (May 27, 1986 letter from V.L. Frankovich to J.W. Hoar)

[Letterhead of IFFA]

May 27, 1986

J. W. Hoar
Vice President - Labor Relations
Trans World Airlines, Inc.
605 Third Avenue
New York, NY 10158

Dear Mr. Hoar:

As you know, it is IFFA's position that the strike was an unfair labor practice strike and that all striking Flight Attendants held the status of unfair labor practice strikers. Accordingly, we demanded their immediate reinstatement as of May 17, 1986.

Putting aside the issue of strikers' status as unfair labor practice strikers and assuming arguendo, as TWA maintains, that the strikers were economic strikers (on whose behalf IFFA made an unconditional offer to return to work on May 17, 1986), IFFA as the bargaining representative of all employees in the Flight Attendant classification hereby make the following demands:

1) that all active Flight Attendant positions other than those currently filled by persons hired strictly as "permanent replacements" be considered as vacancies and filled on the basis of seniority;

2) that all cross-over former strikers (Flight Attendants who abandoned the strike and returned to work prior to IFFA's May 17 unconditional offer) and all new-hires hired for reasons other than strictly as permanent replacements be furloughed or placed in other appropriate inactive status unless their respective seniority -- when compared to that of the entire Flight Attendant workforce -- is sufficient to hold available active positions. In connection with this demand, please note that it is IFFA's position that some, if not all, "New Hires" hired on or about March 6/7 and thereafter were hired irrespective of whether there would be a strike and hence are not "replacements."

3) that no persons who as of May 17 either had not completed Travel College Training or had not otherwise been assigned to active line Flight Attendant status fill Flight Attendant vacancies until all more senior striking Flight Attendants have been offered recall by TWA; and that no "contingent" or other temporary Flight Attendants fill such vacancies so long as all striking Flight Attendants have not been offered recall;

4) that TWA informs IFFA in writing on a regular basis (and no less frequently than once per week) as to the number of active Flight Attendant positions, the names and seniority of those holding such active positions, and the names and seniority of those formerly striking Flight Attendants recalled pursuant to IFFA's May 17 unconditional offer to return to work.

Your prompt reply will be appreciated.

Yours truly,

/s/ VICKI FRANKOVICH
Vicki Frankovich
President

Received: _____ _____ _____
NAME DATE TIME

VF 10S02

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-6

Exhibit Y to the Affidavit of William S. Borden, filed September 17, 1986, in Support of TWA's Motion for Stay Pending Appeal (April 15, 1986 letter from V.L. Frankovich to flight attendants)

April 15, 1986

Dear Flight Attendant:

I have been doing a great deal of thinking these past few days on IFFA's proper course of action for the remainder of our strike. One thing that is become very clear: the high level of commitment demonstrated by the great majority of the IFFA membership who continue to resist Carl Icahn's demands. I say the majority because I know that you and some 600 of your co-workers have crossed the line to go back to work for TWA.

I am sure that you made your own decision after a great deal of thought. No one disputes that, in the end, the choice to cross was yours. But there are many other choices that remain for us. This union remains committed to carry out the mandate of the majority to fight TWA's, onerous demands from the TWA's Flight Attendant work force.

We are committed. The IFFA Membership has repeatedly said that they do not want to give in to Icahn's demands. IFFA has attempted to negotiate responsibly in order to provide TWA with the ability to compete in today's deregulated environment. We recognize that change is taking place in the industry. You may even be surprised that Carl Icahn himself has acknowledged that our latest offer is worth some $70 million dollars per year in total Flight Attendant concessions. What a tragedy it is for us to be on strike for the sake of giving away more money than would be required today to make us competitive with the rest of the industry!

Since you have made your choice, however, I do not want to dwell on the question of fairness or equity. Let it suffice that I see a long term effect of the strike on all of us. Sooner or later, we are all going to be returning to work. The strike will not go on forever and IFFA, as the duly certified bargaining agent for TWA Flight Attendants, will continue to represent the interests of the IFFA membership on this property. What cannot be avoided, however, is that most of the 6500 incumbent IFFA members will not soon forget the sacrifices made in order to prevail in this fight.

Win, lose or draw, those of you who decided that your personal concerns were more important than the will of the majority must accept that you will be held accountable for your actions by large numbers of your peers. This not a threat, only what I believe to be incontrovertible fact. Let me tell you that I truly do not wish to be the President of a Union that is racked by divisiveness and ill will, certainly not while there is a chance for us to close up our ranks and renew our united struggle against Carl Icahn.

I would like to make a proposal to you. Please consider rejoining your peers on the picket line so that we can quickly conclude this battle. Your presence on the airplane only adds incentive for TWA to continue to damage the health of the carrier while seeking to destroy our careers. On the other hand, your sudden withdrawal of services and return to our strike would greatly enhance our chances of ending this strike soon.

We are offering you complete and total amnesty if you return to us. There will be no questions asked and we will open our arms to you upon your return if you do so immediately. Your fellow Flight Attendants will welcome you and you will have eliminated the long term divisions that will occur unless we all reunite ourselves.

Please call us today at IFFA headquarters (212) 697-0654. Your renewed support in our struggle could make the difference in an early and positive settlement for all of us in our dispute with Carl Icahn. Just as important, I think, would be the satisfaction and peace of mind in knowing that you are no longer

working to ensure that the Company can operate by providing guidance and experience to the new hires scabs.

Very truly yours,

Vicki Frankovich
President

BH3JN2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-6

Affidavit of Vernon Laursen (with attachments), filed September 23, 1986, in Support of TWA's Motion to Vacate

AFFIDAVIT OF CAPTAIN VERNON LAURSEN

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Vernon Laursen, being duly sworn, deposes and states:

1. My name is Vernon Laursen. I am employed by Trans World Airlines, Inc. ("TWA") as Staff Vice President, Flight Crew Training. As such, I am the individual charged with the overall responsibility for operations of the TWA Flight Operations Training Center which is located at 1307 Baltimore, Kansas City, Jackson County, Missouri.

2. Since March 7, 1986, I have been aware of the fact that IFFA maintains a local telephonic "hotline" for its members, including those members who reside in the greater Kansas City metropolitan area. Access to the daily recordings on this hotline is obtained by dialing 587-64[illegible]35. A tape recorded message from IFFA's Kansas City Strike Headquarters automatically plays to the listener.

3. Throughout the course of the strike IFFA is presently conducting against TWA, I have recorded, or directed the recording of, hotline messages on a regular basis.

4. Attached hereto are the transcriptions of the taped messages IFFA's Kansas City Strike Headquarters played on April 17, 1986 and May 6, 1986. I have listened to these tapes and I have read the transcriptions and they are, to the best of my

knowledge and belief, accurate transcriptions of what is spoken on the tapes.

/s/ CAPTAIN VERNON LAURSEN
Captain Vernon Laursen

Subscribed and sworn to before me this 9th day of May, 1986.

/s/ HELEN M. WARR
Notary Public

My Commission Expires:
September 25, 1987

HELEN M. WARR
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires September 25, 1987

Thursday, April 17th, 8:55, this is a recording of the IFFA-HOTLINE.

Today is Wednesday, April 16th, this is Chris speaking to you from the Kansas City Strike Headquarters. Today is our 41st day and we are still 90% strong. The analysts hired by the Union said that things look good, and that they are still working on their report. So far, it's 57 pages long. We have offered the company between $62,000,000 and $75,000,000. We will keep you updated on the progress of this project.

Saturday, the 19th, we are having a rally at Jack Frye between 11:00 and 1:00. We will challenge the St. Louis Flight Attendants to see how many scabs we can chase away. They have accepted the challenge and are sending a bus load of Flight Attendants to Kansas City. So let's show them how we do it here in Kansas City.

There is a Union meeting Thursday, the 17th, at the IAM hall at 7:00. There is a video, a new video, from the United Captain who was talking to the Los Angeles Flight Attendants and he's very encouraging. We ask that you take a look at it if you get the opportunity.

The investors and the Flight Attendants have concluded their talks, and an audiotape is forthcoming. The hiring seminar in Columbia was very successful for us, and was considered a bust for them. The interviewers were so upset that they had a legitimate new hirer thrown out because she asked a question that sounded like she knew what she was talking about concerning the fees paid for training.

Once again the Hotline number for New York is 1-900-410-1234. Don't forget there is no picket duty now between 2400 and 0600. If anyone has any ideas on how we can make money legitimately for this domicile here for the strike headquarters, please contact us at headquarters. We can use some ideas.

Just a couple of notes about the company's policy. First, there is no more sick bank, and the scab crossers are being pressed into service to be on-line trainers. The new hires still

need this although they are still serving cold snack on most flights and free liquor. Here's one for you, remember Linda Pretty, the heroine of Flight 850. Well, she quit because of pressure from the striking flight attendants.

One last thought. Have you cost Carl any money today or lately. Let's try and think of ways to make him spend a few more bucks. You know how he loves that. New York has come up with a new scheme to tie up the res lines. We'll have more details on this tonight. From us here at strike headquarters we thank you from our hearts for the courage you are showing, and we do believe that this will pay off for us in the end. We have to continue to stay strong and stay together, and we know this will work out. Thank you and good night.

Today is Tuesday, May 6th. This is Patty speaking on behalf of Kansas City strike headquarters.

The Phoenix sattelite had a surprise visit today from a well-known national public figure. The head of the Rainbow Coalition who started the Push Project in Chicago has always been supportive of the working people and has expressed an interest to assist and support us in finding a way to end our fight. The Reverend Jessie Jackson will be in New York this Wednesday and Thursday for a TWA labor rally.

TWA, as you know, has been telling people that all bases are closed except for New York. However, a scab who crossed in St. Louis was told she would be based in New York, temporarily assigned to St. Louis and would be transferred into St. Louis at the beginning of the month. In Los Angeles, a scab was told she'd be based in New York and her transfer to Los Angeles would be processed on Wednesday. Transferring has never been quite this easy. New York today -- anywhere tomorrow.

Kansas City strikers continue to have great impact at the Training Center. It seems the trainees are afraid to leave Jack Frye now without an escort due to the continuing jeers by picketers. In fact, we understand TWA had to change to Brink's guard

services because Wells Fargo guards are not permitted to escort the scab trainers. We are also advised that there is already some tension building between the 86ers and the scabs. It seems that 83ers are becoming more junior and aren't able to hold a very good line of time any more. They also don't like the idea of being told how to do things by scabs. If they think it's bad now, just wait until we're all back.

We'd like to remind you of the union meeting being held this Thursday at the IAM Hall, 1:30 p.m. Hopeful, the car wash has been rescheduled for this Saturday at 10:30 a.m. at 75th and Metcalf. We need volunteers still. Buckets, soap, hoses and especially towels.

Now some notes from Karen Lantz, the 900 hotline from IFFA headquarters. Rumors of mass crossing during the weekend have once again been proven false. It seems that each weekend there are rumors of a mass crossing which have not materialized but as the results of your resolve and determination to stay out until the strike is settled, and we all return together, we remain 85% strong on the picket line as we end our second month on strike. We at IFFA applaud each and every one of you for your dedication and integrity. You are enabling IFFA, your union, to tell TWA management, as well as other airline management and employers around the world, that flight attendants are professionals with pride. We are receiving feedback on the travel agent cards and have received a promise not to book TWA from a number of travel agents. Congratulations on the hard work you are doing on this project. If you haven't gotten your travel agent cards through strike headquarters yet, please do so as soon as possible. Although there are no formal negotiation sessions scheduled at this time, Vicki remains to be in contact with the company.

And finally, this is National Working Women's Awareness Week. Find out what activities are planned in your area to celebrate the week and make a point of attending. We're certainly a perfect example of what working women and men are forced to

go through to earn a decent wage and decent working conditions.

Thanks for calling the IFFA hotline. This tape will be updated tomorrow.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action No. 86-6084-CV-SJ-6

Affidavit of Mary Pat Taylor, filed September 23, 1986, in Support of TWA's Motion to Vacate

AFFIDAVIT OF MARY PAT TAYLOR

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Mary Pat Taylor, being duly sworn, states and deposes:

1. My name is Mary Pat Taylor. I am an employee of Trans World Airlines, Inc. ("TWA").

2. Prior to March 6, 1986, I was employed as a Flight Attendant for TWA. I was domiciled in St. Louis, Missouri and I resided in Kansas City, Clay County, Missouri. I have at all times since March 6, 1986, continued to reside in Kansas City, Clay County, Missouri.

3. Beginning shortly after midnight on March 7, 1986, I elected to participate in the strike the Independent Federation of Flight Attendants ("IFFA") called against TWA on that date.

4. To that end, I was assigned and performed picket duty at various TWA locations in and around the Kansas City metropolitan area. I remained on strike against TWA until April 2, 1986, at which time I elected to return to employment with the Company.

5. Prior to and during the course of the strike, IFFA provided me and all of its members with an "IFFAmation Hotline" number for the Kansas City Strike Headquarters. That number was and is (816) 587-6135. IFFA members were to call this number for the purposes of receiving negotiation updates, status reports and the schedule of planned activities. A person calling the "Hotline" number hears a taped recording which is updated daily.

6. On April 2, 1986, I was assigned to return to work as a Flight Attendant in St. Louis, Missouri. I remained in that assignment until April 28, 1986, when I received a special assignment to serve as an Instructor at the TWA Flight Operations Training Center, 1307 Baltimore Avenue, Kansas City, Jackson County, Missouri.

7. From April 28, 1986 to the present, I have worked there continuously as an instructor and my duties have included various aspects of instructing TWA Flight Attendant trainees. I report daily to work at 6:15 a.m. and leave at approximately 4:45 p.m. I enter and exit from the Training Center through the front doors of the facility, which face due west onto Baltimore.

8. On Tuesday, April 29, 1986, I reported for work at approximately 6:15 a.m. Because of a large IFFA rally being conducted outside the Training Center between the hours of 1:00 p.m. and at least 5:00 p.m. that day, I did not leave the facility for lunch.

9. At approximately 4:45 p.m., I did leave through the front doors of the facility to go home. I was with two co-workers.

10. As I went through the front doors, a large crowd of IFFA members, many of whom I know personally and have worked with over the years, closed ranks around me and my co-workers. They numbered between 25 and 30. They were screaming, jeering and making movement difficult.

11. My co-workers and I went left, or south, along the east sidewalk on Baltimore. We were attempting to get to the car of one of my co-workers which was parked in a lot adjacent to and directly south of the Training Center.

12. The IFFA members, still in closed formation around us, followed us to the parking lot. They chanted my name in unison and called me "Icahn's whore" and "a slut." Movement down the public sidewalk and into the parking lot was very difficult.

13. My co-workers put me in the back seat of their car. They offered to drive me to my car, which was parked in a lot on the northeast corner of 14th and Main.

14. They pulled out of the lot on 13th and Baltimore and proceeded north on Baltimore to 13th Street. A car, driven by IFFA member Linda Dowdy, pulled in immediately behind the car of my co-workers. Ms. Dowdy continuously honked her horn as she followed us left, or west on 13th Street, left and north on Wyandotte and left or east on 14th Street until we reached the parking lot where my car was parked at the northeast intersection of 14th and Main.

15. I exited from my co-worker's car, got into my car, reentered 14th Street, turned right, or south at Main Street and proceeded south to Truman Road and Main. Ms. Dowdy reappeared behind me, again honking her horn continuously.

16. I turned right, or west, onto Truman Road and crossed the various through streets until I arrived at the intersection of Broadway and Truman Road. Ms. Dowdy was several feet behind me the entire time.

17. While stopped at the intersection of Broadway and Truman Road, Ms. Dowdy bumped the rear end of my car with the front bumper of her vehicle. I turned right and she pulled away after I had gone several blocks.

18. I was terrified, frightened and intimidated by the entire series of events from the time I exited the Training Center until the time I arrived home.

/s/ MARY PAT TAYLOR
Mary Pat Taylor

Subscribed and sworn to before me this 6th day of May, 1986.

/s/ HELEN M. WARR
Notary Public

HELEN M. WARR
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires
September 25, 1987

My Commission Expires:
Sept. 25, 1987

No. 87-548

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permanently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No. 87-548

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (App. Cert. 1)[1] is reported at 819 F.2d 839, 125 L.R.R.M. 2544. It affirms in part and reverses in part a judgment of the United States District Court for the Western District of Missouri, St. Joseph Division (App. Cert. 18) based on a memorandum and order reported at 643 F. Supp. 470, 123 L.R.R.M. 2337.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 26, 1987. On June 5, 1987,

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1 "App. Cert. ____" refers to the Appendices to the Petition for Writ of Certiorari. "JA ____" refers to the Joint Appendix.

Trans World Airlines, Inc. ("TWA")[2] timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order (App. Cert. 16) denying the petition on August 31, 1987. (Circuit Judges Bowman, Fagg and J. Gibson would have granted the petition; Circuit Judges Ross and Magill did not participate.) The petition for a writ of certiorari was timely filed on October 1, 1987 and was granted on March 21, 1988. The jurisdiction of this Court rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

STATUTES INVOLVED

The relevant statutory provisions are the Railway Labor Act ("RLA" or "the Act"), as amended, Section 1 Fifth (45 U.S.C. § 151, Fifth); Section 1a (45 U.S.C. § 151a); Section 2 Third (45 U.S.C. § 152, Third); Section 2 Fourth (45 U.S.C. § 152, Fourth); Section 2 Eleventh (45 U.S.C. § 152, Eleventh); Section 201 (45 U.S.C. § 181); Section 202 (45 U.S.C. § 182); and the National Labor Relations Act ("NLRA"), as amended, Section 2(3) (29 U.S.C. § 152(3)); Section 7 (29 U.S.C. § 157); Section 8(a)(1) and (3) (29 U.S.C. § 158(a)(1) and (3)); and Section 13 (29 U.S.C. § 163). They are reprinted, in part, as Appendix F (App. Cert. 42-46) to the petition for certiorari and, in part, as Appendix A to this brief.

STATEMENT OF THE CASE

The court below, contrary to the district court, sustained Respondent's challenge to unremarkable employer action that has been accepted as lawful by the courts, the National Labor Relations Board and, indeed, labor organizations for fifty years.

Following an unsuccessful economic strike by the Independent Federation of Flight Attendants ("IFFA" or "the Union")—which ended with no back-to-work agreement—TWA reinstated strikers to available vacancies. Like countless

2 TWA has no parent company and no affiliates or subsidiaries, other than wholly-owned subsidiaries.

other employers in the past, it did not displace permanent employees who had worked during the strike in order to *create* vacancies for unreinstated strikers. Since the end of the strike, TWA has maintained a preferential rehire list from which more than 1,100 strikers have been reinstated as vacancies became available. Although not required to do so, TWA has voluntarily reinstated those strikers in seniority order[3] and, upon reinstatement, they have enjoyed the full benefit of their seniority.

Among the working flight attendants not displaced at the end of the strike (in addition to new employees hired during the strike as permanent replacements) were approximately 1,280 flight attendants employed by TWA before the strike began ("incumbents")—who had exercised their right to refrain from striking or to abandon the strike and cross IFFA picket lines in order to return to work.[4] It is undisputed that all were "permanent" employees and that they, like the newly hired replacements, had been told that they would not be displaced at the end of the strike to make room for returning strikers.

Citing this Court's decision in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) ("*Mackay Radio*"), the Eighth Circuit acknowledged the fundamental principles controlling here:

3 In that regard, it is irrelevant whether the 1981-84 collective bargaining agreement between TWA and IFFA remained in effect during and after the strike. As the district court found, that agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22) The Eighth Circuit did not question the district court's finding.

4 Both IFFA and the court below have referred to these flight attendants as "cross-overs" (App. Cert. 7-10) as if the only significant fact concerning their employment were the crossing of picket lines in order to work. The so-called "cross-overs" are referred to in this brief as "incumbents" because (i) that term encompasses the flight attendants who never joined the strike, as well as those who returned to work before its end; (ii) it acknowledges that the flight attendants in question were permanent employees of TWA before the strike began; and (iii) it reflects the critical fact that they were already working as part of TWA's permanent flight attendant workforce when IFFA offered, on behalf of the remaining strikers, to return to work.

- During an economic strike, "the employer may hire permanent replacements for strikers in order to continue business operations";
- "Once an employer hires permanent replacements, economic strikers are entitled to reinstatement only as vacancies occur";
- "The employer is not required to discharge permanent replacements in order to rehire striking employees." (App. Cert. 5)

Applying those principles, the court below correctly held that some 1,200 "new hires" employed during the first week of the strike were not subject to displacement by returning strikers. (App. Cert. 5-6)

Departing from the *Mackay Radio* rule and rationale, however, the Eighth Circuit reversed the district court's clearly correct decision that incumbents are entitled to at least as much protection in their jobs as new hires, and held that incumbents must surrender their jobs to unreinstated strikers with greater "seniority." (App. Cert. 10)[5] Relying principally on its earlier decision in the TWA-IFFA litigation, which is presently before this Court on petition for rehearing,[6] the court below in effect concluded that, by working during the strike, the incumbents were not preventing their own replacement and preserving their own jobs, or replacing flight attendants who chose not to work—but rather were preventing the replacement of more "senior" strikers. It thus shifted the principal risk associated with exercise of the right to strike, *i.e.*, possible job loss due to

5 "Seniority" is set off with quotation marks because the TWA/IFFA contract did not define seniority to include a right to displace working employees after a strike based upon length of service; strikers, therefore, did not have "seniority" for that purpose.

6 *Trans World Airlines* v. *Independent Fed. of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam by an equally divided Court*, 108 S. Ct. 1101 (1988), *pet. for reh'g pending* ("*TWA I*"). In *TWA I*, the Eighth Circuit held that the "union security" clause of the 1981-84 agreement between TWA and IFFA remained in effect, and required the compulsory payment of union dues by the incumbents, as well as by newly hired permanent replacements, during and after the strike. IFFA filed a response to the petition for rehearing on May 18, 1988.

replacement or a reduction in the workforce for economic reasons, away from the most "senior" of those who exercised their right to strike and placed that cost of the strike on employees who exercised their right *not* to strike.

No sound reason or authority was offered for this dramatic alteration of the well-established rules under which employers and unions have long operated in deciding whether to exercise, and in exercising, their respective rights of self-help. Nor did the Eighth Circuit address the anomalous result of its decision: newly hired permanent replacements, with minimal length of employment, are protected in their jobs as against the claims of unreinstated strikers (as this Court has held they must be), while permanent employees with years of service—who also exercised their right not to support the strike—must yield their jobs to many of the same strikers, as though the working employees, and not the strikers, had been replaced.[7]

The Material Facts

TWA and IFFA were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. The agreement did not authorize the exercise of seniority to obtain reinstatement after a strike. (App. Cert. 22) Following written notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA, including direct negotiation, mediation and the final 30-day cooling-off period. On March 7, 1986, approximately two years after negotiations began, IFFA called a

7 Under the Eighth Circuit's reading of *Mackay Radio* and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), if the 100 most junior employees in a workforce of 200 choose not to strike, and if the employer hires replacements for the 100 strikers, the workforce at the end of the strike must be reconstituted to consist solely of the strikers and the newly hired strike replacements. In other words, the employees who did *not* strike would lose their jobs as a result of the employer's decision to replace those who did!

strike against TWA. For purposes of this action, it has been assumed that the strike was over only economic issues.[8]

In order to avoid interruption of its services, TWA operated with those flight attendants who wished to continue or resume working ("incumbents") and hired permanent replacements for the striking flight attendants to complete its workforce. Approximately 1,280 incumbents worked during the strike. (App. Cert. 61) Some never joined the strike; others, who had initially joined the strike, were reinstated by TWA to available vacancies as they offered to return to work during the strike.[9] In addition, TWA hired approximately 2,800 permanent replacements, some 400 of whom were about to complete their training at TWA's Travel College ("TWTC") when the Union called off its unsuccessful strike. (App. Cert. 59, 60)

TWA had given advance notice to the Union and to the flight attendants that, in the event of a strike, it would hire permanent replacements. For example, a February 13, 1986 letter mailed to all flight attendants stated:

> While we do not wish a strike you should be aware that if there is a strike *TWA Will Continue to Operate* . . . . If you do not report for work, the Company is permitted under the law to hire "permanent" replacements for striking employees. We plan to exercise this right, if necessary, in order to continue flight operations. (JA 118; emphasis in original)

TWA had also made plain that the hiring of permanent replacements would put strikers at risk of losing their jobs, subject to rehiring from a preferential rehire list. (JA 120-21, 125)

All flight attendants, like the permanent replacements, were told that if they worked during the strike, they would not be displaced to make room for returning strikers. (App. Cert. 24 n.2; JA 118-22) A week after the strike began, TWA wrote to all flight attendants, assuring the strikers that if they returned to a still vacant position, they would not be displaced at the end of the strike, but stating that TWA had hired and was continuing to hire permanent replacements. (JA 129-31) Another letter, sent on March 29 to all working flight attendants, stated:

> I have heard that IFFA continues to threaten newly hired and other working flight attendants by indicating that they will lose their jobs when the strike is settled unless they cease working and join the picket line . . . . Let me reassure you in writing . . . that if and when a settlement is reached, under no circumstances will newly hired or other working flight attendants be furloughed to make room for returning strikers. (JA 137-38)

On May 17, 1986, although there was no back-to-work agreement and no successor to the 1981-84 collective bargaining agreement, IFFA offered on behalf of striking flight attendants to return to work. Its May 17 letter to TWA stated:

> This offer is made on behalf of all employees who went on strike and *have not returned to work to date*. In the event there are no openings, or insufficient openings, as of the date you receive this offer, you are further advised that said employees will be available for employment to *all openings as and when they develop or to vacancies created by the departure of employees now working*. (JA 80; emphasis added)

A May 18 letter from IFFA, demanding the reinstatement of strikers in seniority order, specifically noted:

> TWA's information as to the identity of those [flight attendants] who have already crossed picket lines and returned to work may be more complete than IFFA's. Accordingly if and when in the recall process TWA comes to the name of an individual who returned prior to IFFA's unconditional offer to return all employees, the recall

---

8 The District Court for the Western District of Missouri has now held that IFFA's strike was an economic one, neither caused nor prolonged by alleged employer violations of the Railway Labor Act. *Independent Fed. of Flight Attendants* v. *Trans World Airlines*, 682 F. Supp. 1003 (W.D. Mo. 1988), *judgment amended* (May 17, 1988).

9 TWA could not properly have refused to reinstate former strikers who offered to return to work while vacancies were available and instead hired new employees to fill the vacancies.

should go to the next individual who has not returned prior to such unconditional offer. (JA 83-84)

On May 21, IFFA again took the position that full-term strikers were entitled to reinstatement in seniority order and advised that, "if recall is made out of seniority order, employees so recalled will return to work—but IFFA will seek full backpay for each employee passed over for *an opening* that would be his/hers if based on seniority." (JA 88; emphasis added) The letters of May 17, 18 and 21 contained no suggestion that the strikers (if economic strikers) were entitled to displace working flight attendants or had any entitlement to reinstatement in the absence of an "opening" or "vacancy."[10]

When IFFA called off its strike, there were fewer than 200 flight attendant vacancies to be filled.[11] TWA drew up a preferential rehire list of all strikers on whose behalf IFFA had offered to return to work and filled the available vacancies from that list. Although not required to do so (*see* n.3, *supra*), TWA maintained the rehire list, and reinstated strikers, in seniority order. (JA 91) At the end of the strike, 197 strikers were offered reinstatement from the preferential rehire list. (JA 94) Since then, more than 900 additional full-term strikers have been reinstated as vacancies occurred. TWA has not hired new flight attendants since the end of the strike.

Upon reinstatement, all strikers were credited with their full pre-strike seniority for all purposes, including protection against layoff and bidding for flight assignments. (JA 110) Pursuant to an arbitral award, they have also been credited with accrued seniority for the entire duration of the strike, as well as any time from the end of the strike to the date of their reinstatement. Thus, the reinstated full-term strikers are senior to all

10 Not until May 27, 1986 (three days before this action was commenced) did IFFA demand the displacement of incumbents with less "seniority" than unreinstated strikers. (JA 147-48)

11 In speaking of the vacancies at the end of the strike, we leave aside those "vacancies" that later resulted from the Eighth Circuit's decision that some 400 flight attendants in training at the TWTC when the strike ended were not "employees" within the meaning of the Railway Labor Act; strikers are being reinstated to positions that were filled by those trainees.

permanent replacements, and their seniority relative to that of the incumbents is precisely the same as it would have been if there had been no strike, or if all pre-strike flight attendants had struck and then remained on strike for the same length of time.

The Inception of This Action

IFFA commenced this action on May 30, 1986. Jurisdiction was invoked pursuant to the RLA (45 U.S.C. §§ 151 *et seq.*) and Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337).

IFFA's first amended complaint alleged two claims. In Count I, the Union sought a declaratory judgment and injunctive relief requiring TWA, as of May 17, 1986, to reinstate approximately 3,000 full-term strikers, displacing over 1,200 replacements hired during the first week of the strike and the approximately 400 last hired before May 17, 1986, as well as all the incumbents (or "cross-over strikers," as IFFA called them) on the ground that the flight attendants to be displaced were not "permanent replacements." (App. Cert. 47-55) In Count II, IFFA sought similar relief, as to all replacements, on the ground that TWA had no "legitimate and substantial business justification" for hiring permanent replacements. (App. Cert. 55-56) On July 21, 1986, IFFA moved for partial summary judgment solely on Count I; TWA's cross-motion also was limited to Count I. (App. Cert. 64-67)

The District Court Decision

The district court held that newly hired permanent replacements, with the exception of the flight attendants in training at the TWTC when the strike ended, need not yield their jobs to returning strikers. (App. Cert. 26-35) Noting that neither the Union nor the authorities reviewed by the court suggested any reason why incumbents should be afforded less protection against displacement than new-hire replacements, the district court also held that the incumbents were not subject to displacement by more senior strikers. (App. Cert. 22-25) It relied on *Mackay Radio*, 304 U.S. 333; *NLRB* v. *Erie Resistor Corp.*,

373 U.S. 221 (1963) ("*Erie Resistor*"); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) ("*Randall*"); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985); and *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982).

In particular, the district court emphasized this Court's language in *Erie Resistor*:

> "[A]n employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. at 232. (App. Cert. 22)

As the district court observed, "[t]his language . . . would protect crossovers as well as new hires from being displaced after a strike." (App. Cert. 22) The court also relied on the Eighth Circuit's implicit sanction in *Randall* of the retention of incumbents at the end of a strike, although some full-term strikers had not been reinstated. "It is quite clear," the district court said, "that the Eighth Circuit had no criticism of simply giving 'permanence' to those who remained at work. It is equally clear that the [Eighth Circuit] knew it was dealing with a situation involving crossovers as well as new hires." (App. Cert. 22-23)

Thus, the district court concluded that the language of *Erie Resistor* and *Randall* "is broadly protective of the rights of *all* persons who work during a strike." (App. Cert. 25; emphasis added) It also reasoned that such protection is "fully justified" (App. Cert. 25) by the rationale of *Mackay Radio*. IFFA's argument that NLRA precedent should be disregarded because of the allegedly greater reinstatement rights of strikers under the Railway Labor Act was rejected as "wholly lacking in support in the cases." (App. Cert. 25)

The Court of Appeals Decision

Citing *Mackay Radio*, the Eighth Circuit affirmed the district court's ruling that new hires may retain their jobs as against the claims of unreinstated strikers. (App. Cert. 5-6) It also affirmed, although on different grounds (not argued or briefed by the parties), the holding that some 400 flight attendants in training at the TWTC when the strike ended were subject to displacement by returning strikers. (App. Cert. 10-14) Neither of these aspects of the decision below is before the Court.[12]

With respect to the incumbents, the Court of Appeals reversed the district court—holding that unreinstated strikers are entitled to displace incumbents with less "seniority." (App. Cert. 7-10) It explained the principal underpinning of its conclusion as follows:

> Most importantly, the terms of the bargaining agreement prevent the cross-overs from being considered permanent replacements. In *TWA I*, *supra*, this court decided that those portions of the agreement not opened for bargaining were not terminated at impasse, but remained in effect. 809 F.2d at 492. Accordingly, the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect. *See* 45 U.S.C. § 152, Eleventh (authorizing "closed shop" agreements).
>
> Thus, all cross-overs must retain their union membership. TWA may not discriminate among union members based on the degree of their union activity. Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity. (App. Cert. 7; footnote omitted)

In emphasizing "union membership," the Eighth Circuit apparently confused actual "membership" in the Union with the compulsory payment of union dues. Citing *Ellis* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984), the court acknowledged that, even where a union "membership" provision is in effect, the RLA requires no more than the timely

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12 The Union did not seek review of the Eighth Circuit's affirmance with respect to new hires. On March 21, 1988, this Court denied TWA's petition for review of the Eighth Circuit's ruling on the status of the flight attendants in training when the strike ended. 108 S. Ct. 1219 (1988).

payment of initiation fees and dues. (App. Cert. 8 n.5)[13] It noted, moreover, that the incumbents had "apparently ceased their union memberships except for payment of dues" and was willing to assume, for purposes of its decision, that "union members may resign from all obligations except that of paying dues . . . ." (App. Cert. 8) Thus, it seemed to treat the compulsory payment of union dues as constituting "membership" in the Union.

As the court below recognized, if the union security clause remained in effect, new hires (once employed for 60 days) were—like the incumbents—required to pay dues to the Union as a condition of continued employment by TWA. (App. Cert. 7 n.4) Purporting to explain why the new hires need not yield their jobs to strikers, the Eighth Circuit observed that they "were not union members when they began work during the strike" and therefore "cannot be the subject of discrimination based upon union loyalty and activity." (App. Cert. 7 n.4) The court did not explain why; nor did it make any reference to the fact that, by the end of the strike, at least under *TWA I*, a minimum of 1,200 new hires were obligated to pay dues to the Union and, therefore, by the court's definition were also "union members."

As further justification for its holding that incumbents must yield their jobs to strikers, the Eighth Circuit relied on *Erie Resistor*, where this Court held that an award of "super-seniority" to those who worked during a strike violated the National Labor Relations Act. The court below did not discuss the *Erie Resistor* language relied on by the district court as "protect[ing] crossovers as well as new hires from being displaced after a strike" (App. Cert. 22)—although it did recognize that in *Erie Resistor* the employer had operated during the strike with both "permanent replacements and cross-overs." (App. Cert. 8)

13 This is reflected in Article 24 of the 1981-84 agreement between TWA and IFFA, under which "membership in good standing in the Union" is explicitly limited to "the payment by the employee . . . of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership." (JA 63)

The Eighth Circuit also acknowledged that TWA did not award "super-seniority" to those who worked during the strike, but opined that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here." (App. Cert. 8) Specifically, it stated:

> Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause. (App. Cert. 9)

The court did not explain how the mere retention of early returning strikers resulted in "differentiat[ion]," "induce-[ment]" or "conflict and division" here, when the same treatment of reinstated strikers was found unexceptionable in *Erie Resistor* itself. Nor did it identify any reason why the retention of incumbents poses new or additional risks for strikers beyond those that flow from the retention of permanent replacements, which it accepted as lawful.

The Eighth Circuit went on to emphasize that "an employer may not divide the workforce into those who engaged in strike activity and those who did not" (App. Cert. 9); it did not explain in what way TWA had "divide[d]" its workforce. The court cited *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), for the so-called "rule that cross-overs returning to their *old* positions are not permanent replacements" (App. Cert. 9; emphasis added), but did not examine whether the incumbents here had in fact returned to their "old positions." And *Randall*, 687 F.2d 1240, relied on by the district court as implicitly sanctioning the retention of incumbents (App. Cert. 22-23), was distinguished by the absence of "a closed shop agreement" between the parties (App. Cert. 10).[14]

14 The court's reference to "a closed shop agreement" between TWA and IFFA (App. Cert. 10), and its citation of RLA Section 2 Eleventh as "authorizing 'closed shop' agreements" (App. Cert. 7), are inexplicable. It is clear beyond question that such agreements are unlawful under both the RLA and the NLRA and, in any event, that no such provision was contained

SUMMARY OF ARGUMENT

Without any principled or even rational basis of support, the decision below is an unprecedented departure from well-settled rules governing the relationship between management and labor, and between strikers and non-strikers. It is also contrary to fundamental principles established by this Court decades ago—principles that formed the legal framework within which the collective bargaining process has been conducted and labor disputants have decided, once the statutory procedures for reaching agreement have been exhausted, whether to resort to self-help.

Purporting to rely on authority under the National Labor Relations Act, the court below concluded:

- that TWA violated the Railway Labor Act by failing to reinstate strikers for whom there were no vacancies at the end of the strike

  —although this Court said in *Mackay Radio* that it is not an unfair labor practice "to reinstate only so many of the strikers as there [are] vacant places to be filled" (304 U.S. at 346);

- that TWA "discriminated" on the basis of "union activity" (App. Cert. 7, 8, 9) by retaining incumbents who had exercised their right to work during the strike

  —although this Court confirmed in *Erie Resistor* that, when particular union activity (*i.e.*, a strike) comes to an end, it is not impermissible discrimination for an employer to retain "those who worked during the strike" even if strikers remain unreinstated (373 U.S. at 232); and

- that full-term strikers are entitled to *displace* less "senior" non-strikers and early returning strikers

in the TWA/IFFA agreement. *See* R. Gorman, *Basic Text on Labor Law* 641-42 (1976); C. Morris, *The Developing Labor Law* 1362 (1983); *see also* n.13, *supra*.

  —although this Court made plain in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967) ("*Fleetwood*") that a returning economic striker is "entitled" to an offer of reinstatement only "[i]f and when a job for which the striker is qualified becomes available."

Since *Mackay Radio* and until the decision below, no court or administrative agency, under the NLRA or the RLA, has required an employer to displace permanent employees in order to create vacancies for returning economic strikers simply because the strikers have more pre-strike "seniority" than incumbent employees. Nor is there any sound authority even suggesting that non-strikers or early returning strikers have less protection against displacement than do new employees hired during the strike. Thus, it has been a settled principle, flowing from the employer's heretofore unquestioned right to continue to operate during a strike (with the help of those who are willing to work), that one of the risks associated with striking is possible job loss (subject to reinstatement from a preferential rehire list) if there are no vacancies when a striker offers to return to work. No court (including the court below) has found that risk, even if realized, to be an impermissible burden on or interference with the right to strike, or to constitute discrimination on the basis of union activity.

Only by mischaracterizing the material facts, and by relying on confused notions of "discrimination," "union membership" and "union activity"—instead of accepting this Court's teaching that, *in the absence of vacancies*, an employer has no obligation to reinstate economic strikers—did the Eighth Circuit reach its unprecedented result. The court found, for example, that TWA "differentiate[d] employees on the basis of their union activity" (App. Cert. 9)—when TWA simply applied to incumbents the same basic principle later applied to full-term strikers: upon their unconditional offer to return to work, they were *entitled* to fill vacant positions for which they were qualified. It read *Erie Resistor* as diminishing the rights of TWA and the incumbents under the *Mackay Radio* doctrine, although this Court said in *Erie Resistor* that it had "no intention of ques-

tioning the continuing vitality of the *Mackay* rule . . . ." 373 U.S. at 232. And it applied the concept of "union membership" to subordinate the employment rights of incumbents to new-hire permanent replacements and full-term strikers, although this Court has made plain that the requirement of "union membership" does not mean that employees must in fact join the union, and that employment rights may be conditioned on "union membership" only to the extent of requiring the payment of initiation fees and dues.[15]

Even if the decision below were not so clearly contrary to settled principles and unquestioned authority, its practical effects would be more than sufficient grounds for rejecting the Eighth Circuit's conclusion. Under the decision below, for example,

- pre-strike employees (some with many years of service) have *less* protection against displacement at the end of a strike than do newly hired permanent replacements;
- the principal risk associated with exercising the right to strike is shifted from the most "senior" of those who chose to strike and placed on employees who chose *not* to strike;
- the requirement that incumbent employees pay dues to a union as a condition of continued employment is, in

15 In 1951 Congress amended the RLA to permit employers and unions to include union security requirements in their agreements for the "limited purpose of eliminating the problems created by the 'free rider' "—"those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 767, 761 (1961).

Accordingly, in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 235 (1956), this Court made clear that the union security agreements authorized by Section 2 Eleventh of the RLA are restricted to conditioning continued employment on "the payment of 'periodic dues, initiation fees, and assessments.' " *See also Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n.10 (1977) (citations omitted), where the Court stated:

> Under both the National Labor Relations Act and the Railway Labor Act, "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."

effect, converted into a back-to-work agreement under which dues-payers *lose* their right to continued employment and must relinquish their jobs to non-dues-paying strikers;

- even if a union miscalculates its economic strength and calls (or prolongs) an ill-conceived strike, individual members of the bargaining unit are unable to preserve their jobs by returning to work, so long as there are more "senior" strikers; and
- pre-strike employees who work during a strike may have their jobs only for the duration of the strike and, at its end, will be subject to displacement—unless they resign from employment before returning to work, and come back as new hires.

At the very least, the novel rule announced by the court below, if allowed to stand, would upset the carefully weighted and long established balance of economic and negotiating power between employers and unions—before, during and after a strike—under both the Railway Labor Act and the National Labor Relations Act.

In any event, the court below lost sight of, or simply disregarded, the fact that by the time IFFA requested reinstatement on behalf of the full-term strikers, some 1,200 former strikers had already done so on their own behalf—and the jobs they filled were no longer "available." *Fleetwood*, 389 U.S. at 381. There is nothing in the decisions of this Court that gives strikers, when the strike is called off, the right to treat occupied positions as vacancies. Nor is there anything that contemplates that strikers may use their pre-strike seniority to obtain a "preference in current employment" (App. Cert. 2) by displacing employees who are occupying the jobs. Thus, whether or not the early returning strikers be labeled (or are) "replacements," or "union members," they are entitled to remain in their jobs, and it is not "discrimination" to decline to allow the strikers to displace them.

It is, moreover, incomprehensible how or why the obligation of employees to pay dues to a union against their will should

require those employees to give up their jobs to unreinstated strikers on the basis of "seniority." (App. Cert. 7) Mere recitation and repetition of the words "discrimination," "union membership" and "union activity"—which have no applicability to the situation here presented—cannot obscure that the very authority on which the court below relied compels the conclusion that TWA had no obligation at the end of the strike to displace working flight attendants (whether new hires or pre-strike employees) in order to create vacancies for returning strikers.

ARGUMENT

I. Under Principles Established By This Court Decades Ago, And Uniformly Applied Until Now, The Flight Attendants Who Exercised Their Right To Refrain From Joining The Strike, Or To Return To Work Before Its End, Have As Great A Right To Retain Their Jobs As Do Newly Hired Replacements And Need Not Be Displaced To Create Vacancies For Later Returning Strikers.

The major purpose of Congress in enacting the Railway Labor Act was to provide a machinery to *prevent* strikes and the interruption of carrier operations. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 148 (1969) ("*Shore Line*"); *Texas & N.O. R.R.* v. *Railway Clerks*, 281 U.S. 548, 565 (1930). The Act does not expressly address either the use of self-help measures after the "almost interminable" statutory bargaining and mediation procedures (*Shore Line*, 396 U.S. at 149) have been exhausted, or the status of economic strikers during or after a strike.

Implicit in the Act, however, "is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' " *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "[I]f the parties exhaust [the statutory] procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA." *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1851 (1987). As this Court has recognized, the availability of self-help measures (including the employer's freedom to operate during a strike with the help of those pre-strike employees and new-hire replacements who wish to work) "may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures . . . ." *Id.* at 1854.

A. The Railway Labor Act: No Statutory Provisions Like Those From Which The Reinstatement Rights of NLRA Economic Strikers Derive

For fifty years under the National Labor Relations Act, federal labor law has struck a delicate and carefully crafted balance between the employee's right to strike and the employer's right to operate and to retain the permanent employees who worked during the strike. *See Mackay Radio*, 304 U.S. at 345-46; *Erie Resistor*, 373 U.S. at 232; *Fleetwood*, 389 U.S. 375; *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) ("*Laidlaw*"); *see also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 524-28 (1983) ("*Belknap*") (Brennan, J., dissenting). In striking that balance, the courts and the National Labor Relations Board ("NLRB") have delineated and defined the rights of economic strikers to reinstatement.

Those rights, however, derive from provisions that Congress chose to include in the NLRA. Congress expressly enacted in the NLRA that nothing "except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ." (29 U.S.C. § 163) and that strikers remain "employees" for purposes of that Act (29 U.S.C. § 152(3)). The Railway Labor Act contains no similar provisions, and this Court has cautioned that the NLRA cannot be "imported wholesale" into the RLA arena and that analogies must be drawn carefully, if at all. *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, *supra*,

394 U.S. at 383; *see also Independent Union of Flight Attendants* v. *Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986) (specifically as to RLA Section 2 Third and Fourth).[16]

Although the Court's pragmatic balancing of competing interests under the NLRA can provide guidance as to the rules to be applied in an otherwise significantly different statutory framework,[17] the differences in the statutory purposes and language must be taken into account. It is arguable that RLA employers have greater rights than NLRA employers to replace strikers—in light of (i) the absence in the RLA of positive provisions similar to Sections 2(3) and 13 of the NLRA (29 U.S.C. §§ 152(3) and 163); (ii) the scope of RLA § 2 Third and Fourth, which the courts have generally construed as narrower than NLRA § 8(a)(1) and (3); (iii) the stated RLA purpose of "avoid[ing] any interruption . . . to the operation of any carrier" (45 U.S.C. § 151a(1)); and (iv) the public service nature of the transportation industry.

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16 The court below did not even identify, let alone discuss, any provision of the RLA that TWA had allegedly violated; it did not follow, or even acknowledge, this Court's admonition that any analogy between the RLA and the NLRA must be drawn with care; and it gave no consideration at all to whether a mere allegation that post-certification conduct by an employer may have an adverse impact on a union is sufficient to create a cause of action under RLA § 2 Third or Fourth.

17 As the district court concluded, "it seems desirable to draw on NLRA experience rather than to create novel principles applicable only in the Railway Labor Act context." (App. Cert. 25) In the few other reported cases dealing with the reinstatement rights of RLA strikers, the courts have generally looked to NLRA precedent for guidance. *See, e.g., Air Line Pilots Ass'n* v. *United Air Lines*, 616 F. Supp. 849, 851 (N.D. Ill. 1985), *aff'd in part and rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987); *Flight Engineers Int'l Ass'n* v. *Eastern Airlines*, 359 F.2d 303, 308 (2d Cir. 1966); *but see Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 385 n.20 (distinguishing the breadth of NLRA Section 7 from the narrower scope of RLA Section 2 Fourth); and *International Bh'd of Teamsters* v. *Pan American World Airways*, 607 F. Supp. 609, 614 n.5 (E.D.N.Y. 1985) (noting that, under the RLA, "the 'anti-union animus' doctrine has limited application outside the context of representational disputes").

Certainly, however, RLA strikers do not have any greater rights to reemployment than do NLRA strikers. As the district court observed, any contention to the contrary is "wholly lacking in support in the cases." (App. Cert. 25) That lack of support, it may be added, is the result of the failure of the RLA to make any express provision for strikes, or to protect concerted activity generally, as does the NLRA. *See, e.g., Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 385 n.20. To the extent, therefore, that it is appropriate to look to the principles that have evolved under the NLRA, as did the courts below, such reference can only define the *outer limits* of the right of RLA strikers to reemployment.

B. *Mackay Radio* And Its Progeny: Settled Rules Under The National Labor Relations Act

The right of employers under the NLRA to hire permanent replacements for economic strikers has long been well-settled. *See, e.g., Mackay Radio*, 304 U.S. at 345-46; *NLRB* v. *Brown*, 380 U.S. 278, 292 n.6 (1965) (referring to the employer's "prerogative to hire permanent replacements for [economic] strikers"); *Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (describing the right to hire permanent replacements as "one of the employer's primary weapons during an economic strike"); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964) (footnotes omitted) ("The Supreme Court's decision in [*Mackay Radio*], and the cases thereafter, . . . state that an employer has a legal right to replace economic strikers at will."). And it is plain from the legislative history of the Labor Management Relations Act that Congress was aware of, and has acquiesced in, the *Mackay Radio* rule.[18]

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18 For example, a 1947 Senate Committee on Labor and Public Welfare report states: "[S]ituations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one . . . , strikers permanently replaced have no right to reinstatement (*NLRB v. Mackay Radio*, 304 U.S. 333)." S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 ("LMRA History"), at 431 (1948). *See also* 93 Cong. Rec. 4310, 4320 (daily ed. April 29, 1947) (statement of Sen. Ball) ("The Supreme Court [in *Mackay Radio*] has held that the em-

The rules concerning reinstatement of strikers are equally well settled. The fundamental principle was stated by this Court fifty years ago:

> *[A]n employer . . . has . . . the right to protect and continue his business by supplying places left vacant by strikers.* And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [an employer] to those who accepted employment during the strike that if they so desired their places might be permanent [is] not an unfair labor practice *nor [is] it such to reinstate only so many of the strikers as there [are] vacant places to be filled.* (*Mackay Radio*, 304 U.S. at 345-46 (emphasis added; footnote omitted).)

Following this Court's decision in *Mackay Radio*, the National Labor Relations Board and at least some courts had ruled that economic strikers who were replaced, or whose jobs were eliminated during the strike, had no right to reinstatement even when jobs later became available. *See, e.g., Brown & Root, Inc.*, 132 N.L.R.B. 486, 494 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963); *Bartlett-Collins Co.*, 110 N.L.R.B. 395, 397-98 (1954), *aff'd sub nom. American Flint Glass Workers' Union* v. *NLRB*, 230 F.2d 212 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956). Subsequent decisions, however, limited the risks associated with exercise of the right to strike by mitigating the effects of replacement or job elimination.

ployees on strike who have been replaced have no right to reinstatement."), *reprinted in* 2 LMRA History 1090, 1102.

A decade later, the Labor-Management Reporting and Disclosure Act of 1959 was enacted, *inter alia*, to "eliminate the statutory prohibition which presently bars [economic] strikers from voting in representation elections." S. Doc. 10, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA History"), at 82 (1959). As one Congressman put it, however,

> The basic rule still stands: An employer hit by an economic strike has the right to hire permanent replacements *for those striking employees who refuse his appeal to return to work.* Once the replacements are hired, the employees still out on strike lose their right to reinstatement in their old jobs. (105 Cong. Rec. A8247, A8249 (daily ed. Sept. 14, 1959) (extension of remarks of Rep. Hagen), *reprinted in* 2 LMRDA History 1817, 1819 (emphasis added).)

In *Fleetwood*, where a strike had curtailed production and resulted in a temporary reduction of jobs, this Court held that the right of economic strikers to reinstatement "cannot depend upon job availability as of the moment when [their] applications are filed." Based on NLRA Section 2(3), the Court reasoned:

> [T]he status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." (29 U.S.C. § 152(3)) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. *If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.* (389 U.S. at 381 (emphasis added).)

Shortly thereafter, the NLRB applied the principle enunciated in *Fleetwood* to economic strikers who had been replaced, and held that strikers who apply for reinstatement at a time when their positions are filled by permanent replacements (and who continue to make known their availability) remain "employees" and as such are entitled to full reinstatement upon the departure of the replacements. *Laidlaw*, 171 N.L.R.B. 1366.[19] The Seventh Circuit, enforcing the Board's order, stated:

19 That a striker, who has not obtained other regular and substantially equivalent employment, remains an "employee" under Section 2(3) of the NLRA means only that he has a continuing relationship with the employer that entitles him to preference over a stranger in filling vacancies (unless the employer has a legitimate and substantial business justification for refusing to reinstate him). *See Fleetwood*, 389 U.S. at 380-81; *NLRB* v. *Transport Co.*, 438 F.2d 258, 264 (5th Cir. 1971) ("[A]s 'employees' under the Act strikers who have not been reinstated or have not found any other regular employment are on what amounts to a preferential hiring list—that is, they are entitled to be reinstated as new jobs are created or as the departure of replacements creates job vacancies before new applicants can be hired.").

There is no question about the retention of the replacements who were hired during the strike on a permanent basis. The only question is whether the strikers are to be considered employees after the strike, having rights to reinstatement if the replacements depart from their jobs. The legitimate business reason for not discharging replacements in order to reinstate strikers, mentioned in *Mackay* and *Fleetwood*, did not authorize denying the Laidlaw strikers reinstatement after the replacements had for one reason or another departed from their jobs subsequent to the strike's termination. Although *there is a "legitimate and substantial business justification" for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force*, no justification was advanced by Laidlaw for its decision to consider the employment status of striker-applicants terminated if, on the day they applied for reinstatement, their former positions were still occupied by permanent replacements. (414 F.2d at 105 (emphasis added).)

Nothing in this Court's decisions following *Mackay Radio*, however, or in those of the lower courts and the NLRB, suggests that economic strikers have a statutory right under the NLRA to reinstatement *in the absence of vacancies* in the

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In addition, once the striker re-enters the workforce, he does so not as a stranger but with all his pre-strike seniority rights. *See Vulcan Hart Corp.* v. *NLRB*, *supra*, 718 F.2d at 275 (emphasis added) ("If the employer can, *on reinstatement*, deny economic strikers the benefits they had accrued prior to the strike (thus treating them in that respect like new hires), it can deny them the protection which the statutory guaranty of continuing employee status implies.")

Until reinstated, however, the striker is not a member of the workforce. *See, e.g., Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 930-31 (7th Cir. 1982) (emphasis added; footnote omitted) (Noting that *Erie Resistor* "held that once strikers *reentered the work force* they could not be discriminated against in favor of non-strikers," the court upheld rules providing that, in the event of a layoff, members of the existing work force would be reinstated before unreinstated strikers because the rules did not classify individuals "according to whether or not they engaged in the strike, but rather, according to whether or not they are *in the work force* at the time of a layoff.").

workforce. Thus, there is no sound authority for visiting the consequences of an absence of vacancies "upon the active employees who were themselves exercising a [protected] right by refraining from collective activity." *Lodges 743 and 1746, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). As the Second Circuit observed (in a statement that applies equally to early returning strikers and new hires),

> No case insofar as we are aware, has required an employer to lay off its active employees so as to make room for strikers. And any such approach would be fundamentally inconsistent with an employer's right to hire permanent replacements for strikers and retain the replacements after the strike while the strikers remain out of work. (*Id.* at 442.)

Thus, exercise of the right to strike need not be cost-free, and "[t]he labor laws have never guaranteed an economic striker that his job will be there when the strike is over." *NLRB* v. *Southern Fla. Hotel & Motel Ass'n*, 751 F.2d 1571, 1583 (11th Cir. 1985). To the contrary, an employer has the right to continue to operate during an economic strike, and is permitted to recruit and hire replacements by assuring them that they will not be displaced by returning strikers. The honoring of those commitments, without more, is sufficient business justification for refusing to reinstate strikers when the strike ends. As this Court stated in *Belknap*, *supra*,

> The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [*Fleetwood*] that the employer have a "legitimate and substantial justification" for its refusal to reinstate strikers. (463 U.S. at 504 n.8.)[20]

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20 *See also NLRB* v. *International Van Lines*, 409 U.S. 48, 50 (1972) ("It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Harding Glass Indus.* v. *NLRB*, 672 F.2d 1330, 1338 (10th Cir. 1982) ("If permanent replacements have been hired before strikers make an unconditional offer to return to work, the employer has a legitimate and substantial justification for refusing to reinstate the strikers.").

A fortiori, there is no need to justify the retention of incumbent employees who worked during the strike.

C. The Settled Rules: Protection of Non-strikers And Early Returning Strikers

The court below acknowledged the established right of employers to fill places left vacant by economic strikers, and recognized that returning strikers have no right to displace those who have permanently replaced them. (App. Cert. 5) It refused, however, to apply the same rule to incumbents because, according to the Eighth Circuit, they did not "acquire the status of permanent replacements." (App. Cert. 8) Precisely what the court meant by that language is not clear; the court did not explicate why incumbents did not have that or equivalent status, why they would need it or how, if at all, they might "acquire" it. It is clear, however, that the Eighth Circuit misapprehended in several respects the NLRA authority on which it relied.

This Court's seminal decision in *Mackay Radio*, illuminated by its subsequent decisions in *Erie Resistor* and *Fleetwood*, makes plain that an economic striker has no right to reinstatement in the absence of a vacancy. As the Court stated in *Mackay Radio*, it is "not an unfair labor practice . . . to reinstate only so many of the strikers as there [are] vacant places to be filled." 304 U.S. at 346. In *Erie Resistor*, construing NLRA § 2(3), the Court went no further than to say that it "preserves to strikers their *unfilled* positions and status as employees during the pendency of a strike." 373 U.S. at 233 (emphasis added). And, in *Fleetwood*, the Court stated that an economic striker is entitled to an offer of reinstatement only "[i]f and when a job for which the striker is qualified becomes available . . . ." 389 U.S. at 381.

Nor is there any basis in those decisions for a contention that a job must be treated as "vacant" at the end of a strike simply because it is held by an incumbent rather than by a new-hire replacement. To the contrary, as the district court correctly concluded, *Mackay Radio*, as construed by this Court in *Erie Resistor*, "protect[s] crossovers as well as new hires from being displaced after a strike." (App. Cert. 22)

Indeed, in each of these cases, the employer had operated during the strike with non-strikers and/or early returning strikers in addition to new-hire replacements. In *Mackay Radio*, for example, those who worked during the strike, to whom this Court said assurances of permanence could lawfully be made and honored, were already employed before a nationwide strike began and were transferred to a location where their services were needed after they chose not to join the strike.[21] *See* 1 N.L.R.B. 201, 206 (1936); 304 U.S. at 337. In *Erie Resistor*, the employer operated during the strike with "new employees, employees on layoff status and returning strikers," all of whom the Third Circuit described as "replacements." 303 F.2d 359, 360 (3d Cir. 1962). In *Fleetwood*, too, approximately half of the pre-strike employees never joined the strike or returned to work before its end. 366 F.2d 126, 127 (9th Cir. 1966); 389 U.S. at 376, 379.

Yet, nowhere in this Court's decisions or in those of the Courts of Appeals and the NLRB is there any suggestion that the employer's retention of incumbents, while strikers remained unreinstated, was unlawful. In fact, in its brief as *amicus curiae* in *Fleetwood*, even the AFL-CIO did not suggest that full-term strikers had a right to *displace* incumbents with less seniority, although (i) there were no vacant positions when full-term strikers sought to return to work and (ii) over two-thirds of the positions in existence at the end of the strike were held by non-strikers and early returning strikers. 366 F.2d at 127, 129. Implicitly conceding the right of all working employees to retain their jobs, the AFL-CIO addressed only the rights of strikers, *vis-a-vis* those of new applicants, to placement in *vacancies* as they became available.[22]

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21 Here, too, many of the incumbents, when they chose not to join the strike or returned to work during the strike, were assigned to different locations where they were needed. (JA 108-09)

22 Emphasizing that, under Section 2(3) of the NLRA, strikers continue to be "employees" during and after a strike, the AFL-CIO took the po-

In *Laidlaw*, where the NLRB first ruled that replaced strikers have a continuing right to rehire as vacancies occur, approximately thirty percent of the pre-strike employees never joined the strike and others crossed picket lines to return to work before it ended. 414 F.2d at 101; 171 N.L.R.B. at 1384. Neither the NLRB nor the Seventh Circuit, however, found anything unlawful in the employer's retention of non-strikers and early returning strikers at the end of the strike (in addition to new-hire permanent replacements) although some 50 full-term strikers were denied immediate reinstatement because there were no vacancies in the workforce. 171 N.L.R.B. at 1366-67, 1385; 414 F.2d at 103-07.

Laidlaw also established that even *during a strike*, an employee is entitled to *full* reinstatement upon request if a vacancy exists. Concluding that Laidlaw's failure to offer full reinstatement to an early returning striker (rather than offering to hire him as a new employee) was an unfair labor practice, the NLRB reasoned that the failure fully to reinstate a striker to an opening "could only penalize [him] for engaging in concerted activity, was inherently destructive of employee interests, and thus was unresponsive to the requirements of the statute . . . ." 171 N.L.R.B. 1367-68.

The decision below flies in the face of, and would effectively undo, *Laidlaw*'s protection of a returning striker's right, if vacancies are available during the strike (as they were here), to be *fully* reinstated upon application. Under the Eighth Circuit's rule, incumbents who choose to return to work during a strike could avoid displacement at the end of a strike only by quitting their jobs, forfeiting their seniority for all purposes, and returning to work as new-hire replacements. In effect, therefore, the court below would require such strikers, in order to ensure preservation of their jobs, to return to work as new employees.

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sition that "an employer must honor a striker's continuing application for reinstatement *as jobs open up* and at the earliest possible moment, without regard to whether his job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the application was made." AFL-CIO Amicus Brief, at 11, *reprinted in* 20 U.S. Supreme Court Records and Briefs (Oct. Term 1967) (emphasis added).

That, however, is precisely what *Laidlaw* says the NLRA forbids.

Other decisions of the Courts of Appeals confirm that an employer's right to retain permanent employees who worked during a strike has never before been treated as limited to new-hire replacements and that, absent agreement by the employer to the contrary, unreinstated strikers have no right to displace non-strikers or earlier returning strikers from their jobs. *See, e.g.*, *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987) (employer's retention of early returning strikers at the end of a strike was conceded to be lawful although some full-term strikers were not reinstated); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) (employer could not be compelled to permit strikers to exercise pre-strike seniority to obtain full-time, rather than part-time, jobs in preference to replacements and earlier returning strikers); *NLRB* v. *Southern Fla. Hotel & Motel Ass'n*, 751 F.2d 1571, 1582-83 (11th Cir. 1985) (no violation for an employer to retain non-strikers in new positions to which they were reassigned during a strike after elimination of their former department, although full-term strikers remained unreinstated); *Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (where the court stated that strikers "are entitled to reinstatement as vacancies arise, although they may not displace permanent replacements"—making no distinction between the non-strikers, early returning strikers and new-hire replacements before it); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (where neither the NLRB nor the court raised any question concerning the propriety of the employer's post-strike retention of early returning strikers); *Wells Fargo Armored Serv. Corp.*, 237 N.L.R.B. 605, 606 (1978), *enf. denied on other grounds*, 597 F.2d 7 (1st Cir. 1979) (although employer had agreed to reinstate strikers in seniority order, no claim that early returning strikers were subject to displacement); *H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) (addressing rights of economic strikers *vis-a-vis* new hires, but making no reference to the many non-strikers retained by the employer); *NLRB* v. *Transport Co.*, 438 F.2d 258, 260 (5th Cir. 1971) ("The Company, having decided to retain

the eight replacements and the three nonstriking drivers . . . ," reinstated only four of seventeen strikers at the end of the strike.).

Until the decision below, no court has suggested that the assurances of permanence approved by this Court in *Mackay Radio* may be made only to new-hire replacements, or that an employer's right to retain "those who worked during the strike" (*Erie Resistor*, 373 U.S. at 232) is limited to new hires. Nor, with the sole exception of the panel majority in *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) (which considered the post-strike status of a single employee), has any court ruled that an already reinstated striker must literally be a "replacement" for a particular unreinstated striker in order to retain his job at the end of the strike.[23] As Judge Pell observed in the dissent in that case, the decisions of this Court give "no indication that the strikers who returned to work during the strike were any less protected than the new employees"—and there is no reason or authority why former strikers should not be "entitled to the same protection as . . . outsider[s]." 471 F.2d at 699, 700.

That conclusion follows from the rationale of *Mackay Radio* which applies equally to incumbents and permanent replacements. As the district court here said:

> It would seem that employers faced with a strike would have at least as great a practical need for employing crossovers as new hires, if crossovers can be induced to return to work. The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark

23 In the unlikely event that the Court views who replaced whom as relevant, moreover, the only logical answer is that each of the 2,400 new-hire permanent replacements lawfully hired and retained by TWA took the place of a striker. If they initially replaced incumbents (who were not yet working) then, when those incumbents returned to work, they must have filled "places left vacant by strikers" (*Mackay Radio*, 304 U.S. at 345) and, even under the dubious decision in *Clark*, the incumbents were "replacements" entitled to keep their jobs when the strike ended. Clearly, in any event, the newly hired employees were not, as the strike ended, "replacing" the incumbents with whom they were working side by side.

> decision of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
>
> Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back. It is surely as difficult psychologically for old employees to abandon their coworkers and cross a picket line as it is for new hires to take such action. (App. Cert. 24; footnote omitted)

The record evidence concerning the experience of TWA's pre-strike employees who exercised their right to work during the strike called by IFFA confirms the district court's thoughtful observations.[24]

II. Relying On Confused And Inapplicable Notions Of "Discrimination," "Union Membership" And "Union Activity," The Decision Below Distorts National Labor Relations Act Authority And Applies That Distortion To The Railway Labor Act.

As demonstrated above, reason, practical experience and authoritative statements of the courts all point to the conclusion that an employer is free, at the end of a strike, to retain those who worked during the strike, be they pre-strike employees or new hires. Clearly, strikers do not have the right to displace new employees who have permanently replaced them. It is equally clear that pre-strike employees who remain at or return to work during a strike cannot be treated—and, until the decision below, have not been treated—as though they were preserving the jobs that they fill for others who have chosen to remain on strike. The distorted and illogical reasoning of the court below in reaching its contrary result is predicated on misleading characterizations of the facts, and consists of nothing more than an

24 *See, e.g.*, IFFA's January 2, 1986 letter to flight attendants (JA 105-06, 136); its April 15, 1986 letter to flight attendants (JA 149-51); IFFA's "Hotline" messages of April 17 and May 6 (JA 154-57); the April 1986 letter from a pre-strike flight attendant who returned to work (JA 141-46); and the affidavit of an incumbent who worked as an instructor during the strike (JA 158-61).

empty recitation of concepts and so-called rules that have no application whatsoever to this case.

A. Only By Describing An Occasion For "Discrimination" That Did Not In Fact Occur, Was The Eighth Circuit Able To Reach Its Novel Result.

In the opening sentence of its opinion on the "cross-overs," the court below misstated the district court's holding as follows:

> *The district court held that the* approximately 1280 striking *employees who "crossed over"* and went back to work during the strike *were* also *permanent replacements* and not subject to displacement by full-term strikers with greater seniority. (App. Cert. 7; emphasis added)

But what the district court actually held was that incumbents were entitled to at least as much protection in their jobs as new-hire permanent replacements—simply recognizing and applying the settled principle that strikers have no right to reinstatement in the absence of vacancies. It was the absence of vacancies—not any "status" or "preference" granted by TWA (App. Cert. 7, 2)—that prevented the reinstatement, at the end of the strike, of most full-term strikers.

Ignoring this principle, however, the Eighth Circuit disingenuously portrayed the end of the strike as an occasion for choice or "preference" by TWA that allowed the court to substitute for the decisions of this Court a discrimination analysis that simply has no applicability here. Thus, the court below began and ended its opinion by speaking of "preference" in employment (App. Cert. 2, 14)—as if the incumbents and the full-term strikers were a pool of applicants for unoccupied positions, and as if TWA had selected from the supposed pool those who would fill the positions. But there was no such pool of non-working employees; there were no unoccupied positions; and TWA made no such selection. The incumbents exercised their right to continue working or resume working during the strike; the strikers exercised their right to continue striking. At the end of the strike, TWA simply left all flight attendants as they were and as *they* had chosen to be—either working or not working—subject to offers of reinstatement to fill vacancies from a preferential rehire list. The operative choice was made not by TWA, but by the employees who chose to strike or not to strike.

The Eighth Circuit's fundamental distortion of these events is further demonstrated by its repeated statements to the effect that TWA "award[ed]" or "accord[ed]" incumbents the "reward" of "permanent replacement status." (App. Cert. 7-9) But TWA did not "award" permanent status to incumbents; they were permanent employees before the strike began. And there was no need that they be "replacements" for others. Those who exercised their right not to join the strike merely continued to work in permanent positions. As to those who initially joined the strike, TWA simply applied the same basic principle, enunciated by this Court, that was later applied to the full-term strikers: upon their unconditional offer to return to work, returning strikers are *entitled* to fill vacant positions for which they are qualified. TWA could not have declined their offer to return to work and given preference to new-hire replacements, even if it had wished to do so.

Thus, even if a discrimination analysis were appropriate here (*but see* pp. 35-36, *infra*), there was no discrimination "among union members" (App. Cert. 7) or otherwise. All flight attendants—whether union members or not, whether active in the union or not—were told that if they did not return to work they might be permanently replaced; all were reinstated if openings existed when they offered to return to work; and, upon reinstatement, all were accorded the full benefit of their seniority. The unreinstated strikers suffered no "discrimination" and were subject to no decision based upon "degree of . . . union activity." (App. Cert. 7) At the end of the strike, they were simply faced with a reality well understood and long accepted as a potential consequence of the decision to strike—deferment of reinstatement due to the absence of vacancies.

B. The Reliance By The Court Below On The "Union Security" Provisions Of The 1981-84 Agreement Is Without Foundation In Law Or In Reason.

;Article 24 of the 1981-84 agreement between TWA and IFFA (JA 62)—even if still in effect—requires nothing more than the payment of union dues as a condition of employment. It

- does not create any vacancies or confer any rights of seniority;
- does not require that those covered by the clause be "union members" (App. Cert. 7);
- does not address questions of discrimination "on the basis of . . . union activity" (App. Cert. 9); and
- most certainly has neither the purpose nor the effect of assuring that no "conflict" or "division" (App. Cert. 9) exists between those pre-strike employees who chose to strike and those who chose not to strike.

The Eighth Circuit's decision in *TWA I* therefore has no conceivable applicability here, whether it was correctly decided or not.[25]

Based on that prior ruling, however, the court below contrived a syllogistic rationale for its holding in this case:

- "TWA may not discriminate among union members based on the degree of their union activity."
- "[A]ll cross-overs must retain their union membership" because "the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect."
- "Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates *among union members* based on the degree of their union activity." (App. Cert. 7; footnote omitted; emphasis added)

That analysis defies explanation.[26] Indeed, it seems to be only an artificial construct that permitted the court below to distinguish between the rights of the so-called "cross-overs" (who, according to the Eighth Circuit, were subject to displacement at the end of the strike because they were "union members") and those of the new-hire replacements (who, the court said, could retain their jobs because they were not "union members" and therefore could not be "the subject of discrimination based upon union loyalty and activity"). (App. Cert. 7 n.4)[27]

25 Given the Eighth Circuit's heavy reliance on *TWA I* in this case, however, summary reversal of the decision below would be warranted if this Court grants rehearing in No. 86-1650 and reverses the decision in *TWA I*.

26 Apparently recognizing that the Eighth Circuit's reliance in this case on its decision in *TWA I* cannot be justified, the Union has now disavowed it. In its opposition to the petition for rehearing in No. 86-1650 (at p.2), IFFA states that the result in this case "in no way hinges upon . . ." the decision in *TWA I* and that the decision below "did not turn upon the existence of the contract." The Eighth Circuit, however, viewed its decision in *TWA I* as "[m]ost important[ ]" (App. Cert. 7) to the result reached below.

27 Despite its heavy reliance on the concept of "union membership," the Eighth Circuit never delineated what it meant by that term. At several points in its opinion, referring to "closed shop agreements" as requiring "union membership" (App. Cert. 7, 10) and speaking of "resign[ation]" from a union (App. Cert. 8), the court below seemed to mean actual (or full) union membership. On the other hand, it assumed for purposes of its decision that "union members may resign from all obligations except that of paying dues . . ." and noted that those incumbents who had been full members of the Union "have apparently ceased their union memberships except for payment of dues." (App. Cert. 8)

The court's apparent confusion in this regard is illustrated by its citation of RLA Section 2 Eleventh as "authorizing 'closed shop' agreements" (App. Cert. 7), which are, of course, unlawful under the RLA as well as the NLRA (*see* n.14, 15, *supra*), and its statement that a union "cannot penalize its *members* for working during a strike . . ." (App. Cert. 8; emphasis added), although (at least under the NLRA) a union may of course do so. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95 (1985), cited by the court below (App. Cert. 8), addressed a situation in which a union had fined *former* members who worked during a strike *after* resigning their union membership.

Mackay Radio, *Erie Resistor* and *Fleetwood*, however, establish the right of those who worked during a strike to keep their jobs *not* by virtue of any discrimination analysis regarding union members or non-members—a subject on which those decisions are entirely silent—but by giving determinative weight to the employer's legitimate interest in operating its business during a strike. This Court did not analyze the retention of replacements and others who worked during the strike in terms of any

decision based on "union loyalty [or] activity." (App. Cert. 7 n.4) It said that an employer's right "to protect and continue [its] business" (*Mackay Radio*, 304 U.S. at 345) justifies giving them assurances of permanence. The reasoning of the court below simply fails to appreciate that, regardless of the appropriateness of a discrimination analysis in other contexts, the decisions of this Court establish that the making and honoring of such assurances is a self-help measure that Congress has permitted employers under federal labor law.

In any event, the untenability of the Eighth Circuit's formulation of its holding in terms of "discrimination," "union members" and "degree of union activity" is revealed by the obvious logical difficulties to which it leads. The court below recognized, for example, that, under *Mackay Radio*, the new-hire replacements—who had less seniority than both the incumbents and the full-term strikers—need not relinquish their jobs at the end of the strike. (App. Cert. 4-6) It also acknowledged that the union security clause "requires that new hires obtain union membership in order to continue employment with TWA." (App. Cert. 7 n.4) Attempting nonetheless to differentiate between the new hires and the incumbents, the court said:

> New hires . . . were not union members when they began work during the strike. Thus, new hires cannot be the subject of discrimination based upon union loyalty and activity. (App. Cert. 7 n.4)[28]

This purported distinction results in discrimination by the court itself on the basis of "union membership." Assuming that the incumbents were "union members" and that the new hires were not, the court concluded that the incumbents, solely by virtue of their "union membership," are subject to displacement by more senior full-term strikers. Thus, under the Eighth Circuit's rule, the court itself gave a "preference" (App. Cert. 2) to new hires with little seniority, over permanent employees with greater seniority, because the former were not deemed to be "union members."

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28 By that remarkable assertion, the Eighth Circuit would presumably remove from the protection of NLRA § 8(a)(3) all newly hired employees.

Impermissible discrimination based on union activity, moreover, does *not* turn on whether the individuals involved are "union members." *See, e.g., Stepanischen* v. *Merchants Despatch Transp. Corp.*, 722 F.2d 922, 927 (1st Cir. 1983). If, therefore, as the Eighth Circuit said, not displacing incumbents from their jobs at the end of the strike to make room for full-term strikers with greater "seniority" constitutes discrimination based on degree of union activity, it would be just as "discriminatory" not to displace the new hires who exercised their right not to join the strike.[29] But, as even the court below conceded, this Court has made plain that an employer need not displace new hires at the end of a strike to create vacancies for full-term strikers.

Even if a distinction between union members and nonmembers were relevant, moreover, the Eighth Circuit's application of that distinction here does not withstand the slightest scrutiny. When the strike ended, some 1,200 new-hire replacements were "union members" to the same extent, if at all, as were the incumbents.[30] Neither group was required to hold actual membership in the Union (*see* n. 13, 15, *supra*); both were required, at least under *TWA I*, to pay dues to the Union.

Finally, the union security provisions do not confer seniority rights for *any* purpose and cannot be treated as a substitute for a back-to-work agreement. Nor do they have the purpose or effect of establishing the right, as among covered employees, to

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29 The court below apparently overlooked that new-hire replacements have a right to strike and sometimes do. *See, e.g., Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 890 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987).

30 The Eighth Circuit's focus on the time when the new hires began to work (rather than at the end of the strike) is inexplicable. There is not even a claim that "discrimination" occurred when new hires began their employment or when incumbents were reinstated; TWA had the right to hire permanent replacements, and strikers who offered to return to work during the strike while vacancies were available were entitled to reinstatement. Thus, the point of controversy is at the *end* of the strike when there were more strikers than vacant positions and TWA simply left incumbent employees in place (whether newly hired replacements, non-strikers or early returning strikers) and did not displace them to make room for full-term strikers. It is that so-called "differentiat[ion]" that the court below found impermissible.

exercise seniority to displace employees from the jobs they hold. To the contrary, as this Court has made plain, a "union membership" requirement may affect employment rights *only* to the extent of conditioning employment on the payment of initiation fees and dues. (*See* n.15, *supra*.) The purposes for which seniority may be used are, in any event, a matter for agreement between employer and union. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526-27 (1949).

C. The Eighth Circuit's Unarticulated Assumption That Strikers Are Entitled to Reinstatement In Seniority Order Is Incorrect And, In Any Event, Irrelevant.

The court below said that TWA could not "*prevent* full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity." (App. Cert. 7; emphasis added) Nowhere, however, did it identify the source of the right that TWA "prevent[ed]" full-term strikers from exercising—and there is no such right. Most egregiously, the Eighth Circuit did not even allude to any basis in the RLA for the right it assumed.

The district court found as fact that "[t]he contract between IFFA and TWA . . . does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22) And, under the NLRA, it is a "settled principle that an economic striker has no statutory right to be recalled by seniority." *Bingham Willamette*, 282 N.L.R.B. No. 165, slip op. at 6 n.5 (1987).[31] As this Court said in *Mackay Radio*, an employer may rely on "skill or ability . . . or any one of a number of methods

31 *Accord, American Olean Tile Co., supra*, 826 F.2d at 1500 ("There is no right to recall according to seniority in the absence of such a provision in a collective bargaining agreement or 'a binding established past practice.' "); *NLRB v. Wells Fargo Armored Serv. Corp.*, 597 F.2d 7, 10 (1st Cir. 1979) (finding "no precedent" for a rule requiring reinstatement in strict seniority order); *Indiana Desk Co.*, 276 N.L.R.B. 1429, 1447 (1985) (noting that employees "did not go on strike on a seniority basis" and holding that they need not be reinstated on that basis); *Bio-Science Laboratories*, 209 N.L.R.B. 796, 796 (1974) ("unreinstated economic strikers do not have the statutory right to recall in accordance with a collective bargaining agreement provision covering recall from layoffs . . .").

of determining which of its striking employees [will] have to wait because [others] had taken permanent positions during the strike . . . ." 304 U.S. at 347.

Here, in any event, there is no issue as to the order in which full-term strikers were reinstated, for TWA voluntarily reinstated them in seniority order, as vacancies occurred. (JA 91) With respect to the early returning strikers, TWA simply did what it was required to do when they offered to return to work; it reinstated them to available vacancies for which they were qualified. The balance established in *Laidlaw*, 171 N.L.R.B. 1366, requires that strikers, including early returning strikers, be fully reinstated upon request if and when a position becomes available; it does not require that non-strikers or former strikers already reinstated be displaced to make room for full-term strikers. Only the openings available at the end of the strike (and those that later become available) are to be allocated among the full-term strikers. Even then, moreover, the openings need not be assigned "on the basis of seniority or in any other particular manner." *Indiana Desk Co., supra*, 276 N.L.R.B. at 1447.

No subsequent decision of the NLRB or the courts expands the *Laidlaw* rights of economic strikers so as to require the displacement of working employees. To the contrary, more recent cases only confirm that non-strikers and early returning strikers are entitled to remain in their jobs unless the employer and union agree otherwise. For example, in *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1242 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), where "a steady stream of individual strikers requested leave to return to work during the course of the strike," Randall maintained a chronological list of such strikers and offered job openings to those on the list in preference to hiring permanent replacements. Some strikers were reinstated before the strike ended but, when a full complement of workers was reached, Randall ceased reinstating strikers. After the strike ended,

> [w]hen additional production workers were needed, Randall first recalled persons on the sign-up list, in order of signing. After exhausting the sign-up list, Randall recalled

> persons on the list submitted by the Union, in order of seniority. (*Id.*)

Neither the NLRB nor the Eighth Circuit found anything improper in the reinstatement of early returning strikers in the order of their application, or raised any question concerning the propriety of the post-strike retention of strikers who returned to work before the strike ended.

The Sixth Circuit, in *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), held that an employer could not be compelled to permit reinstated strikers to exercise their pre-strike seniority to obtain full-time (rather than part-time) jobs, in preference to earlier returning strikers. *A fortiori*, full-term strikers would have no right to *displace* junior crossovers. In *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), the Sixth Circuit confirmed that crossovers who work during a strike need not yield their jobs at the end of the strike to more senior strikers and, like the *Randall* court, found nothing improper in the employer's use of a chronological list of employees who offered to return during the strike when there were no vacancies, to fill vacancies that arose *after* the strike.[32]

In *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982), the Seventh Circuit upheld a seniority system under which employees in the workforce at the time of a *post*-strike layoff (including early returning strikers) would have recall rights in preference to more senior unreinstated strikers. Emphasizing that unreinstated strikers have a right to reinstatement only when a vacancy occurs, the court expressly rejected a claim that such recall rights constituted unlawful discrimination. Drawing no distinction between early returning strikers and new-hire replacements, the Seventh Circuit said:

> The seniority system [at issue] does not discriminate between strikers and non-strikers, nor does it deny unreinstated strikers the right to reinstatement should vacancies occur in the work force. Rather, it constitutes the very

32 On the latter point there was a dissent, but even the dissenting opinion recognizes that there is no right to reinstatement in order of seniority. 826 F.2d at 1507 n.8. Counsel for the union also conceded that "use of the chronological list was lawful during the strike." *Id.* at 1501.

> practice upheld in *Mackay*: the assurance of permanent status to replacement workers. (675 F.2d at 931.)

If the so-called "rule" that the court below announces were correct, the early returning strikers in *Giddings* could not have remained in their jobs long enough to be laid off; they would have been displaced by the more senior strikers upon the strikers' request for reinstatement.

* * *

In sum, stripped of its erroneous assumptions, its mischaracterizations of fact and its confused notions of "union membership," the Eighth Circuit's principal rationale for the conclusion that incumbents are subject to displacement by full-term strikers has nothing left to support it. In effect, it amounts to the imposition on TWA of a back-to-work agreement that was never negotiated or agreed to by the parties.

Yet, judicial imposition of such contract terms is no more consistent with the Railway Labor Act in a post-strike context than it is at any other time. The RLA simply " 'does not undertake governmental regulation of wages, hours or working conditions.' " *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 289 (1963), *quoting Terminal R.R. Ass'n of St. Louis* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943); *see also Virginia Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 548 (1937). Nothing in the Act, or in this Court's decisions interpreting it, suggests that the "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements" (*Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 579 n.11 (1971)) applies with any less force to the judicial imposition of a back-to-work agreement than it does to any other contract term.

D. The Court Below Apparently Misapprehended And Clearly Misapplied *Erie Resistor*.

In *Erie Resistor*, this Court found inherently discriminatory an employer's grant of twenty years "super-seniority," for purposes of *future* layoffs, to employees who worked during the strike, and the post-strike layoff of reinstated full-term strikers

whose seniority was, as a result of the super-seniority policy, insufficient to retain their jobs. In effect, that policy penalized all *reinstated* full-term strikers by reducing their seniority relative to that of all employees who had worked during the strike. As the Court said, it "operate[d] to discriminate between strikers and non-strikers, both *during and after a strike* and its destructive impact upon the strike and strike activity cannot be doubted." 373 U.S. at 231 (emphasis added).

Here, in contrast, full-term strikers were reinstated with their pre-strike seniority preserved—both absolutely and relative to that of *all* employees who worked during the strike, including the incumbents. Unlike *Erie Resistor*, there is no "cleavage" (373 U.S. at 231) in the workforce: the reinstated full-term strikers are senior to all new-hire permanent replacements, and their seniority relative to that of the incumbents is exactly the same as it would have been if there had been no strike. In these circumstances, to say, as did the court below, that retention of the incumbents gives rise to the same "concerns" voiced in *Erie Resistor* is to say that A is non-A.

The Court made plain in *Erie Resistor*, moreover, that it had "no intention of questioning the continuing vitality of the *Mackay* rule . . ." (*id.* at 232); it merely declined to extend that rule to the "particular means [before it] of attracting replacements." (*Id.*) As the Court stated, "*Mackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself." (*Id.*) Thus, the *Erie Resistor* Court was careful to distinguish the assurances of permanence approved in *Mackay Radio* from an award of super-seniority. Restating the NLRB's analysis of the characteristics and effects of super-seniority, the Court said:

> Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced. *It is one thing to say that a striker is subject to loss of his job at strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.*
>
> • • •
>
> *Unlike the replacement granted in Mackay which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended.* Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general. (373 U.S. at 230-31 (emphasis added).)

In other words, as this Court held in *Mackay Radio* and reaffirmed in *Erie Resistor*, in balancing the competing interests of employers and employees, the risk that an economic striker will lose his job is *not* an impermissible burden on or interference with the right to strike. That risk—known and considered by all responsible unions, and presumably communicated by them to their constituencies—is the sole risk to which the strikers here were exposed. No new or additional risks flowed from TWA's retention of all permanent employees, including incumbents, who worked during the strike.

The Eighth Circuit nonetheless read *Erie Resistor* as voicing "concerns . . . applicable to the status of the cross-overs here." (App. Cert. 8) Specifically, it stated:

> Awarding the crossovers permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause. (App. Cert. 9)

The court below simply ignored that these supposed effects differ in no significant way from "awarding . . . permanent replacement status" to new employees hired during the strike.[33]

Nothing that this Court said in *Erie Resistor*, moreover, or in any other decision, suggests that it is "differentiat[ion]" on the basis of "union activity" for an employer to decline, at the conclusion of a strike, to displace those permanent employees who did the work of the strikers. Not allowing strikers to displace incumbents simply cannot create "long-term conflict and division within the workforce" because, by definition, the strikers are not "in the workforce." Once they are reinstated to vacancies, there is no division even remotely resembling that disapproved by the Court in *Erie Resistor* because they have all their seniority rights and, in fact, are just as senior relative to others in the workforce as they were before the strike.

The concerns expressed by the Court in *Erie Resistor* flowed from the fact that the super-seniority at issue there, *unlike replacement*, would have persistent effects years after the end of the strike by creating a continuing distinction between full-term strikers and others *within the active workforce*—a distinction that would divide the workforce and reopen old wounds every time there was a layoff. As the Court stressed, that division of the workforce would be "reemphasized with each subsequent layoff and [would] stand[ ] as an ever-present reminder of the dangers connected with striking and with union activities in general." 373 U.S. at 231. *See also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 505 n. 8 (1983) (noting that *Erie Resistor* "involved an offer of super-seniority to replacements" and that "[t]he opinion was careful to distinguish cases not involving that element").

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33 The hiring of permanent replacements may also "induce[ ] employees to abandon the strike . . . ." (App. Cert. 9) As to "conflict and division within the workforce" (App. Cert. 9), it would be naive to suggest that nothing but harmony will prevail between new-hire replacements and strikers reinstated after the strike, especially those whose reinstatement is delayed by the presence of replacements. The Court that authorized the retention of new-hire replacements (with days or weeks of service) cannot have thought it unduly "divis[ive]" (App. Cert. 9) for an employer to retain incumbent employees (with years of service).

No such division or distinction was created here. Nor did TWA "induce" strikers to abandon the strike, other than perhaps by exercising its unquestioned right to hire permanent replacements—an "inducement" approved by this Court fifty years ago. *Mackay Radio*, 304 U.S. at 345-46; *Randall, Div. of Textron, Inc.* v. *NLRB*, *supra*, 687 F.2d at 1244; *see also*, *e.g.*, *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 208 F. Supp. 182, 193-94 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *I. Bahcall Steel & Pipe*, 287 N.L.R.B. No. 139, slip op. at 9 (1988); *The Texas Co.*, 93 N.L.R.B. 1358, 1359 (1951), *enf. denied on other grounds*, 198 F.2d 540 (9th Cir. 1952).

The Eighth Circuit's treatment of post-*Erie Resistor* cases is equally flawed. Typical is its reliance on *George Banta Co.*, 256 N.L.R.B. 1197 (1981), *enforced*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The vice in *Banta* was not that early returning strikers (as here) *remained* in the positions they occupied during the strike; indeed, that is not what occurred in *Banta*. What the Board found violative of the NLRA, was that—regardless of the positions early returning strikers occupied during the strike, and without reference to the company's production needs—when the strike ended, they were given their respective *pre-strike* job classifications and wage rates. Reinstated full-term strikers, in contrast, were assigned "whatever classification status Banta deemed appropriate," often at wage rates substantially below their pre-strike rates. 686 F.2d at 18; 256 N.L.R.B. at 1219-20.

Also a violation of the NLRA was that, under the company's "Preferential Reinstatement System" ("PRS"), while crossovers enjoyed *all* their pre-strike rights, reinstated full-term strikers suffered continuing post-strike penalties, including reduced "bumping" and rate-retention rights. Indeed, as the Administrative Law Judge emphasized, the substantial and continuing *post*-reinstatement rewards for crossovers and penalties for reinstated full-term strikers were even "more pervasive" in *Banta* than was the super-seniority plan in *Erie Resistor*. 256 N.L.R.B. at 1219-20. In fact, as the Court of Ap-

peals noted, even Banta did "not dispute the discriminatory effect of the PRS." 686 F.2d at 18-19.[34]

The court below also relied on *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) as announcing a "rule that cross-overs returning to their old positions are not permanent replacements." (App. Cert. 9) If that "rule" was announced in *Clark*,[35] it is contrary to the use of the term "permanent replacement" in *Mackay Radio* and *Erie Resistor* to include all "those who worked during the strike" (373 U.S. at 232), including non-strikers and former strikers. Even if the majority opinion in *Clark* were correct, moreover, it flatly contradicts the Eighth Circuit's apparent assumption that "replacement" means only *new* employees hired during a strike, since it acknowledged that an incumbent employee could be a "replacement."[36]

In any event, no other decision has so much as suggested that incumbents must literally be "replacements" for particular strikers in order to retain their jobs at the end of a strike. For good reason, therefore, the district court declined to follow *Clark*—emphasizing that the majority gave no authority or reason for its ruling and recognizing that the dissent by Judge Pell (who thought it clear that the employee in question had re-

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34 The *Banta* court did not say "that the nature of the benefit conferred on cross-overs was irrelevant." (App. Cert. 9) It did say, citing *Erie Resistor* and other cases in which the employer had granted crossovers or new-hire replacements a preference over *reinstated* full-term strikers, that "*[i]n such cases*, the nature of the particular benefit is irrelevant." 686 F.2d at 19 (emphasis added). Clearly, what the court meant was that an employer may not discriminate between *reinstated* full-term strikers and others in the active workforce, be it in seniority for purposes of protection from layoff (as in *Erie Resistor*) or in rates of pay and other benefits (as in *Banta*).

35 *Clark* was a suit to enforce an arbitral award and the opinion of the majority is far from clear. It is clear, however, that in *Clark*, reinstatement following the strike was governed by a strike settlement agreement that provided for reinstatement on a seniority basis. 471 F.2d at 697.

36 The court below, moreover, did not even consider whether the incumbents here had returned to their pre-strike jobs. In fact, few, if any, of them returned to the same assignments they had before the strike. (JA 108-09) Therefore, even under the *Clark* majority's definition, virtually all the incumbents would be "replacements."

turned to his own pre-strike job and equally clear, on the reasoning of *Mackay Radio* and *Erie Resistor*, that he was entitled to remain there when the strike ended (471 F.2d at 699-70)) is far more persuasive. (App. Cert. 23-24) As the district court also noted, moreover, recent decisions "make questionable whether *J.L. Clark* would still be followed [even by the Seventh Circuit]." (App. Cert. 25) *See, e.g., Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 930 (7th Cir. 1982), where the Seventh Circuit stated:

> [I]n *NLRB v. Erie Resistor Corp.* . . . the Court held that once strikers reentered the work force they could not be discriminated against in favor of non-strikers. *Erie Resistor* thus involved only the rights of strikers who had been reinstated. (citation omitted)[37]

Erie Resistor, and subsequent cases, make clear that what is forbidden, because they are inherently destructive of the right to strike, are rewards for non-strikers or early returning strikers and penalties for full-term strikers that persist *after* strikers have returned to the work force. What is forbidden is the creation of continuing distinctions between strikers and non-strikers *in the workforce*, by a grant of "super-seniority" as in *Erie Resistor* itself, or by other forms of continuing discrimination within the active workforce, such as granting preferential rates

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37 It is not correct that the Seventh Circuit has "recently approved reliance on *J.L. Clark*." (App. Cert. 9) In *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), the Seventh Circuit does not, at the page indicated or elsewhere, even cite to the *Clark* case. What it says is that, at least where anti-union animus has been established, non-strikers cannot be awarded preferred positions that they did *not* occupy during the strike in preference to more senior reinstated strikers. The district court in the *United* case had cited *Clark* solely in support of the proposition "that in order for a crossover to be entitled to a job assigned during a strike, the employer must prove that the replacement actually occupied the position during the strike." 614 F. Supp. 1020, 1046. Contrary to the implication of the court below, neither the district court nor the Seventh Circuit approved the "rule" that an early returning striker had to fill a position other than his own in order to keep his position at the end of the strike. And the Seventh Circuit in *Giddings*, *supra*, plainly held that early returning strikers may retain their jobs at the end of a strike as against the claims of unreinstated senior strikers. (*See* pp. 40-41, *supra*.)

of pay (as in *George Banta Co.* v. *NLRB*, *supra*), or denying reinstated strikers preferred shifts (as in *Randall, Div. of Textron, Inc.* v. *NLRB*, *supra*).

TWA created no such distinctions. In the exercise of its right to continue to operate, it told newly hired strike replacements and all pre-strike employees that if they worked during the strike so that TWA could operate, they would not be ousted in favor of strikers when the strike ended. Any such promise arguably discourages, to some extent, exercise of the right to strike, as the Court recognized in *Erie Resistor*. 373 U.S. at 232. At the same time, the Court confirmed that the protected right to strike is not an "unqualified right," and preserves to strikers only "*their unfilled* positions and [under the NLRA] status as employees during the pendency of a strike." *Id.* at 233 (emphasis added). It does not give strikers the right to take positions that are *filled* at the end of the strike, whether those positions are permanently filled by newly hired employees, by employees who never joined the strike, or by strikers who have previously returned to work—any more than it gives strikers the right to demand that production be increased and more jobs created. *See Fleetwood*, 389 U.S. 375.

The plain and undisputed fact is that when the full-term strikers offered to return to work, there were fewer than 200 vacancies in TWA's flight attendant workforce. Those vacancies were promptly filled by returning strikers—who have been credited with their full seniority—and no striker was denied reinstatement to an available vacancy. There is, therefore, no basis in this record or in law for any conclusion that TWA violated the Railway Labor Act.

CONCLUSION

The decision below, which would work a major change in the long-settled relationships between employers and unions, and between strikers and non-strikers, is not grounded in the language or purpose of the Railway Labor Act; nor is it supported by precedent, analogy under the National Labor Relations Act, or reason. It should therefore be reversed.

Respectfully submitted,

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May 26, 1988

APPENDIX A

APPENDIX A

Supplementary Text of Statutes Involved

RAILWAY LABOR ACT

45 U.S.C. § 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 157. *Right of employees as to organization, collective bargaining, etc.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158. *Unfair labor practices*

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-

bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

29 U.S.C. § 163. *Right to strike preserved*

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

No. 96-1662 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Under the Railway Labor Act, does an employer impermissibly "influence or coerce" the exercise of the right to strike by promising employees who abandon the strike preference over full term, more senior strikers in determining which pre-strike employees shall hold positions in the active, paid work force after the strike is over?

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Since April 1, 1977, Respondent Independent Federation of Flight Attendants ("IFFA" or "the Union") has been the certified, duly designated exclusive bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, of all Trans World Airlines, Inc. ("TWA" or "the Company") employees in the flight attendant craft or class. (JA 18).[1] IFFA and TWA have been parties to a series of collective bargaining agreements, the most recent of which was signed in 1983 and which itself has been the subject of considerable litigation, pertaining to the continuing existence of its union security clause (and other provisions of the contract which were not properly altered following the submission of specific changes in those provisions through the RLA's bargaining processes).[2] It was when lengthy negotiations between the parties to amend this agreement broke down in March of 1986, leading to a two and a half month strike by the flight attendants, that the controversy in the instant case arose.

TWA chose to operate the airline during the strike and, in fact, had embarked months before on a flight attendant training program in order to have a ready supply of workers to fill strikers' positions if the need arose. (JA 97-100). In the first week of the strike, TWA hired approximately 1270 training school graduates as immediate replacements for striking flight attendants to work along side the small percentage of bargaining unit employees who chose not to join their fellow employees on

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[1] References to the Appendix to the Petition for Certiorari will be "App. Cert. ——," The Joint Appendix will be "JA ——," and references to TWA's brief on the merits will be "TWA Br. ——."

[2] *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 640 F. Supp. 1108, *aff'd*, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam*, —— U.S. ——, 108 S.Ct. 1101 (1988), pet. for reh'g pending ("*TWA I*").

the picket lines. During the course of the strike, new hire replacements were added to the workforce as they graduated from the training academy. In addition, there were, as time went on, pre-strike unit employees who "crossed over" the picket lines to return to work; these "crossovers" numbered approximately 1280 by the end of the strike.[3] (App. Cert. 2, 60-61).

After the strike ended, fewer than 200 of the approximate 5000 full-term strikers were granted reinstatement to "available" positions in the active workforce. (App. Cert. 19). TWA refused to reinstate any of the other approximately 4800 strikers, instead retaining all of the newly hired replacements, including the 463 then still in training, and the entire group of crossovers, many of whom had less seniority than full-term strikers still still awaiting reinstatement. TWA did, however, later recall some of the unreinstated strikers in order of their seniority as vacancies arose. (App. Cert. 3).

IFFA initially brought this action in the district court claiming that TWA had committed discrimination in violation of the RLA by denying reinstatement to over 2000 of the full-time striking employees who had unconditionally offered to return to work at the end of the strike on May 17, 1986. The lawsuit is a declaratory judgment action and is premised in part on the theory that, assuming that these employees were simply economic strikers,[4] they

[3] TWA prefers the term "incumbent employees" to the term "crossovers." (TWA Br. S, n. 4). The latter terminology will be retained by IFFA, not only for the sake of consistency but also for clarity: The term "crossover" more aptly describes the group of employees in question. Even the small percentage of pre-strike unit employees who chose not to join the strike from the very beginning had to "cross over" their fellow employees' picket lines to continue working during the strike, as did the majority of the group who abandoned the strike at various stages to return to work.

[4] *See Independent Fed'n of Flight Attendants v. Trans World Airlines*, 682 F. Supp. 1005 (W.D. Mo. 1988) ("*IFFA v. TWA*"), holding the strike to be an economic strike.

should nonetheless have been reinstated to their pre-strike jobs in preference to certain of the newly hired replacements (including the 463 who had not completed their training before the strike ended), and to less senior crossover employees.[5]

On cross-motions for partial summary judgment, the district court ruled in favor of the Union by holding that the approximately 463 newly hired replacements who were still in training at the time the strike ended could not lawfully be granted preference in employment over the full-term strikers. That court ruled in favor of TWA in holding that the approximately 1200 newly hired replacements and 1280 crossovers could lawfully be given such preference and retained at the end of the strike at the expense of the full-term strikers. (App. Cert. 22-35). With regard to the question here for the Court involving the crossovers, the district court acknowledged that there was virtually no direct case precedent covering the issue. Nevertheless, that court held that:

> The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark decision of *NLRB v. Mackay Radio Co.*, 304 U.S. 333 (1938). Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back. . . . If *Mackay Radio* is sound (and I recognize that some academic critics advocate disabling employers from hiring permanent replacements for strikers)

[5] As here pertinent, IFFA's complaint stated two different causes of action. The first complained of the preference accorded crossovers over full-term strikers in awarding positions in the active workforce once the strike was over, and is the cause of action presently before the Court. (App. Cert. 52-55). The second sought to establish that it was not necessary for TWA to offer permanent jobs to the replacements hired from outside the pre-strike workforce and that TWA therefore violated the RLA by doing so. (App. Cert. 55-56). The second cause of action has not yet been tried and is still pending.

> the same principle would seem to apply to protect crossovers. [App. Cert. 24-25].

In addition, the district court rejected IFFA's argument "that the Railway Labor Act should be interpreted to give greater protection for strikers than is conferred by the [NLRA]." (App. Cert. 25)

On cross appeals by the parties, the Eighth Circuit affirmed those portions of the district court's ruling permitting TWA to retain the 1200 newly hired replacements in active employment and finding it impermissible for the Company to have retained the approximately 463 new hires still in training at the time the strike ended. The Court of Appeals, however, reversed the lower court's ruling with regard to the crossovers, holding that it was unlawful discrimination for TWA to have retained the entire group of crossovers in active employment at the end of the strike in preference to more senior full-term striking employees. The Eighth Circuit held that this constituted impermissible discrimination because TWA's choice was based upon the extent of the striking employees' union activity and loyalty as reflected in how long each employee spent on strike. (App. Cert. 7-10):[6]

[6] At one point in its opinion, the court of appeals articulated the principle applied as being that "TWA may not discriminate among union *members* based on the degree of their union activity," (App. Cert. 7 (emphasis supplied)), and for that reason laid stress upon the fact than in *TWA I*, the court of appeals had held previously that the union security clause continued in effect during the strike. TWA spends a large portion of its brief (TWA Br. 31-38) refuting this reliance on the union security portion of the collective bargaining agreement. It appears, however, that the court of appeals simply used language at that point in its opinion that fails to distinguish between *unit* members—that is, those employees represented by the union before the strike—and *union* members, and for that reason thought the union security provisions pertinent. The bulk of the court of appeals' reasoning, however, does not rely on the strikers' union membership or lack thereof. This brief proceeds on the premise that the union security clause is indeed *irrelevant*, but that the court of appeals' result, and the basic thrust of its reasoning, are nonetheless correct.

In *NLRB v. Erie Resistor Corp.*, [373 U.S. 221 (1963)], the Supreme Court upheld the NLRB's decision that an award of super-seniority to permanent replacements and cross-overs unlawfully discriminated against those who engaged in union activity. 373 U.S. at 231-32. Although TWA has not awarded super-seniority to the employees who worked during the strike, several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here.

The Court disapproved of super-seniority because the award operated to the detriment of strikers as compared to nonstrikers: it in effect offered an inducement to abandon the strike; and it created a long-term division among the workforce. *Id.* at 231. Although an award of super seniority brings these concerns into a sharper focus than does the conferring of permanent replacement status to cross-overs, these concerns are nonetheless present. Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activities, induces employes to abandon the strike and is likely to create long-term conflict and division within the workforce . . . [App. Cert. 8-9].

SUMMARY OF ARGUMENT

I. In this case, the employment relationship is a fluid one; flight attendants move in and out of the paid work force frequently, and, while on paid status, change monthly the time, place, and nature of their work assignments. In distributing work assignments to and among the active workforce, TWA and IFFA agreed to apply seniority principles so that at any given moment, job security and job satisfaction would be distributed according to length of service.

The method TWA used for deciding which of the employees in the unit that went on strike would be in the active workforce after the strike fundamentally rearranged this system, and the expectations of the employees inherent in the system. By setting up a competition

among employees for the post-strike jobs based upon the speed with which each employee abandoned the collective strike effort, TWA revamped a neutral system of distributing work among employees into one which had both the purpose and effect of discouraging continued adherence to concerted strike activity. The question in this case is thus not whether TWA's treatment of crossovers in its striker reinstatement program had a coercive impact upon the exercise of the right to strike—that much is plain—but whether the Railway Labor Act sanctions such employer action in a strike situation despite its coercive impact.

II. 1. In determining the kinds of employer responses to employee strike activity that are permitted by the RLA, the appropriate starting place is the nature of the protection accorded the right to strike under the RLA. As this Court has explicitly held, the right of employees to strike is an integral part of the RLA statutory scheme. That right is protected not only from governmental prohibition but, as well, from employer retaliation: § 2 Fourth of the RLA makes it unlawful for an employer "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." As this Court's cases make clear, exercise of the right to strike as a means of achieving the employees' economic goals is an essential aspect of union membership. Thus, § 2 Fourth necessarily includes protection from employer retaliation for strike participation.

2. A. If TWA's grant of employment preferences to crossovers were valid, that must be because the explicit statutory prohibition against coercive employer action is limited by some *implied* privilege to burden the right to strike by providing certain economic benefits to individuals who abandon the strike effort. In evaluating the claim that such a privilege exists under the RLA, two approaches suggested on the petitioner's side must be rejected: On the one hand, there is no basis for importing the details of NLRA law into the RLA wholesale. On the other hand, there is certainly no basis, given the explicit protection contained in § 2 Fourth, for presuming that the RLA, unlike the NLRA, permits unlimited self-help by both employees and employers, regardless of the detrimental impact on the overall statutory scheme. Thus the task here is to examine the RLA's structure and purposes in their own terms and to interpret the statute accordingly.

B. Following this approach, several interrelated principles emerge. First, as a general matter, the RLA embodies a greater concern for the overall stability of labor relations than does the NLRA. Indeed, this difference was the raison d'etre for including the airline industry in the RLA rather than in the NLRA. In pursuit of this stability concern, the RLA views any use of economic weapons as only a temporary interruption in an otherwise continuous relationship.

Second, and more specifically, the RLA envisions continuity of three kinds between the pre- and post-strike periods: (1) the terms and conditions of employment that are not the subject of the dispute ordinarily remain in place during and after a strike; (2) mass turnover of employees, or other disruptions of the employer-employee relationship because of a strike, are disfavored; and (3) maintenance of the pre-strike bargaining relationship, and of the capacity of employees to engage in collective action, is favored.

At the same time, the RLA does envision effective employer (as well as employee) self-help and to some degree erects a preference (not present in the NLRA) in *favor* of continuous operation. This Court, in *Brotherhood of Ry. & S.C. v. Florida E. C. Ry.* ("F.E.C."), 384 U.S. 238, 246-47 (1966), recognized that these policies permit *some* compromise of the RLA's continuity principles during a strike. However, *F.E.C.* also establishes that any deviations from pre-strike circumstances

should ordinarily be temporary, and must be proved to be "reasonably necessary" to the employer's continued operations.

3. The approach mapped out in *F.E.C.* applies here as well. Like the employer self-help involved in *F.E.C.*, TWA's policy regarding poststrike preference of crossovers threatens all three stability concerns of the RLA. And, while it is possible that an employer could demonstrate the necessity of such a preference in order to continue operations, no such demonstration has been made here nor can employer necessity be presumed. Crossovers are not giving up other permanent jobs, and loss of livelihood for a prolonged period during the strike standing alone may well be enough to induce returns to work.

III. Insofar as it is relevant under the RLA, nothing in the NLRA caselaw relating to strike replacement issues undermines this analysis. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) established not one but two principles: First, that an employer may not discriminate against former strikers in reinstatement by disfavoring those most active in the strike effort; and second, in dictum, that in order to operate during a strike, an employer is privileged to assure newly hired strike replacements permanent status.

Later cases of this Court make clear that the second principle of *Mackay* was not intended to swallow the first. Rather, the *Mackay* rule regarding the offering of permanence to replacements is a limited exception to the general principle that employers may not take actions that on their face treat union adherents detrimentally as compared with those who do not exercise their right to support a striker. In particular, *Mackay* does not sanction (1) employer promises of permanence that go beyond that necessary to continue operations during a strike; or (2) employer promises of preference for crossovers (as opposed to promises of permanence to outside strike replacements), with the more profound impact

upon exercise of collective rights that results from setting up a competition *among* the members of the group that decided to strike. And *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) affirmatively indicates that employer policies with the latter effect are to be scrutinized more closely than those that do not have such an impact. Thus, while it is not clear that this case would be decided the same way under the NLRA as we argue it should be decided under the RLA, there is no barrier in the NLRA cases or their reasoning to the result for which we argue.

ARGUMENT

I. Introduction

Because of the nature of the industry in which they work, flight attendants face an unusually fluid employment situation:

> The IFFA-TWA Agreement does not refer to flight attendant "positions," [with an exception not here pertinent]. . . . Instead the IFFA-TWA Agreement refers generically to "categories" and/or "classifications." Flight attendants do not have regular shifts. Flight attendants report for duty, from day to day, at different times and different locations. Flight attendants, from day to day and even within the same day, work on different air craft. . . . In case of furlough (layoff) and displacement due to reductions in force, flight attendants have options to move into different categories and different domiciles. By the same token, flight attendants who have been furloughed or displaced have recall rights not to domicile but to classification only. [Affidavit of Victoria Lee Frankovich filed Aug. 22, 1986 with Supplemental Suggestions Re Motion for Partial Summary Judgment].

This fluidity characterizes not only assignment while on active duty but, as well, movement into and out of the active, paid workforce:

> Displacement of Flight Attendants from one category to another, from one geographic location to

another and furlough to the street have been routine and common occurrences at TWA. The causes for these actions include seasonal reductions in operation, transfer of flying time between one domicile and another, change in size of equipment flown, changes in cabin staffing (crew complement) and other causes. [For example because of] [f]urlough and displacement activity in 1984 . . . no less than 293 Flight Attendants were geographically relocated; 420 Flight Attendants were furloughed to the street, and an additional 23 Flight Attendants elected furlough to the street rather than geographic displacement . . . . [Affidavit of Victoria Lee Frankovich filed Oct. 6, 1986 with Suggestion in Opposition to TWA's Motion for Stay; *see* JA 6].

In response to this employment situation, TWA and IFFA (and IFFA's predecessors) developed over the years a particularly complex scheme in which competitive seniority determines nearly every aspect of the employment relationship that involves making choices between employees.[7] Thus, as a general matter, "seniority [governs] all employees in case of furlough due to reduction in forces, reemployment after furlough, choice of vacancies, and preference of assignment to equipment" (JA 27), and is the decisive factor as well in the complicated bidding system for determining, *each month*, which flight attendants fly which equipment, from and to which cities, at which times (JA 43-62). Similarly, employees returning from leaves of absence may bid, according to seniority, "on any vacancy existing on the system" and, if unsuccessful in that bid "may displace the least senior employee in her or his status on the operation on which the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the

[7] As this Court has noted, even in modern unionized work places in which there is a more stable employment relationship than in this case, seniority determines many incidents of the employment relationship. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766-67 (1976).

employee being displaced." (Stipulations, Exhibit 1, Art. 15D, pp. 91-92).

The outcome of the pervasive competitive seniority system is that ordinarily the workforce is arranged so that at any given time, the more senior the flight attendant, the more secure and the more satisfactory—in terms of location, assignment, and schedule—is his or her employment situation. With the advent of the strike that gave rise to this lawsuit, TWA determined fundamentally to disrupt the relative seniority situation among the employee group who, collectively by majority vote, determined to strike in support of their bargaining demands after negotiations and mediation had failed to produce agreement.[8]

Before the strike in this case began, and thus without attempting to operate during the strike by other means (App. Cert. 24), the employer made several related announcements. First, the company intended to "continue its flight operations if the Union calls a strike" by, *inter alia*, hiring new flight attendants who "will not be furloughed or displaced to make room for returning strikers." (JA 120-21). Second, in determining which of the pre-strike employees would be eligible to fill any positions *not* awarded to newly-hired replacements at the conclusion of the strike, "returning strikers will be offered jobs on a first come, first served basis." (JA 121). *See also* JA 100-01. ("Those Flight Attendants who work during the strike will not be furloughed to make room for strikers (regardless of seniority) who later offer to return"). Third, TWA specifically promised that any flight attendants who returned to work during the strike would have the opportunity to bid for more desirable domiciles[9]—such as Los Angeles—and for promotions to

[8] ". . . IFFA sought and received from its members 'overwhelming authorization to strike.'" *IFFA v. TWA*, 682 F. Supp. at 1008.

[9] A "domicile" within the meaning of the TWA-IFFA collective bargaining agreement is the city in which a flight attendant is based, in the sense that he or she is supervised by management

service manager vacancies; "[a]ny transfers so awarded will remain effective after the strike is over." (JA 121).[10]

It is plain the purpose of making these announcements was precisely to induce incumbent employees not to join the strike effort, or to abandon that effort after the strike began.[11] And it is self evident as well that the likely effect of this scheme was to deter employees from exercising their right to strike, by setting up a competition among members of the pre-strike bargaining unit that could be won only by abandoning the collective effort more quickly than other employees. Finally, it is apparent as well that the impact of TWA's scheme would not evaporate on the day the Union finally bowed to the pressure created by that scheme: Long after the strike was over, and as among employees in the active workforce, the effect of TWA's crossover program would be to cement those who crossed the picket line into more desirable jobs than the jobs available to more senior recalled full-term strikers who, but for the strike, would have been entitled to the

located in that city, and scheduled out of that city. (JA 43 *et seq.*). There is, of course, no requirement that the flight attendant actually reside in that city, but those who live far from their domiciles will necessarily spend much unpaid time "commuting" to their domicile in order to be present in time for flights scheduled to leave from that city.

[10] Each of those promises was reiterated and reinforced in the early days of the strike. Thus, on March 14, 1986, seven days after the strike began, TWA sent a letter to all flight attendants assuring that striking flight attendants who returned to work during the strike would not be displaced at the end of the strike (JA 104). A similar communication, by mailgram, was sent on March 17; that communication provided a "guarantee [that] if you work throughout the remainder of the strike you will not be replaced when the strike is over," and indicated that due to transfer awards to be made on March 21, all cabin attendant domicile vacancies in certain locations—San Francisco and Los Angeles—"are likely to be filled by March 21." (JA 104-05).

[11] To make this statement is not to prejudge the outcome of this case. As we develop below (pp. 30-34, *infra*), the RLA does permit a limited range of employer options that adversely affect the striking employees and that are *necessary* to operating during a strike.

more desired classifications and domiciles.[12] Put another way, TWA's crossover program reordered indefinitely the internal relationship among pre-strike employees in a way likely to carry forward into the post-strike period the divisions among the pre-strike workforce that were created by TWA's crossover policy and that led to the demise of the strike.

The employer's position in this case is that under the Railway Labor Act, 45 U.S.C. § 151 et seq., TWA was privileged to confront striking employees with this "combination threat and promise [that] could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231-32 (1963). In support of this

[12] To take a concrete example: One can surmise from the way in which TWA advertised in its strike communications the availability of openings in Los Angeles and San Francisco that those two domiciles were the most sought after among the flight attendants. If this were the case, then one would expect that those two domiciles had a much more senior workforce than the others and that the likelihood of a junior flight attendant transeferring to either on the basis of competitive seniority was slim.

The very point of the system, in fact, is that the longer a flight attendant stays with the company, the more likely it is that the attendant will be able to relocate to California; indeed, much of the justification for using seniority as a principle for distributing workplace benefits and burdens is precisely that seniority discourages turnover and encourages stable employment. *Cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 n.5 (1973).

After the strike, however, the composition of the workforce in the sought-after domiciles would no longer reflect this value of employment stability. Instead, a disproportionate number of junior employees, *distinguishable from other employees only by the fact that those employees had abandoned the strike effort*, would be in the California workforce. To any reinstated full term striker who had planned to transfer to California when he or she had accrued sufficient seniority, and who now would be unable to do so for an indefinite period of time, the message is clear: "On the moving escalator of terms and conditions affecting this particular employment" (*Oakley v. Louisville & N. R.R.*, 388 U.S. 278, 283 (1949)), those within the active workforce who supported union activity are on a lower step with respect to some, albeit not all, desirable benefits than those who did not.

proposition, TWA relies principally upon cases decided by this Court under the NLRA. For reasons developed in Part III, *infra*, that reliance is misplaced; the NLRA cases do not directly address the question in this case, and the logic of those cases, and particularly of *Erie Resistor*, *supra*, supports the proposition for which we argue here. As we show in Part II, *infra*, however, this case can and should be decided under principles established by the statute directly at issue, the Railway Labor Act.

II. Under The Railway Labor Act, An Employer Generally May Not Prefer Crossovers To Full-Term Strikers For Post-Strike Positions In The Active Workforce, Because To Do So Interferes With The RLA's Overall Statutory Scheme Aimed At Preserving Continuity Of Operations Through Stability Of Labor Relations.

1. *The RLA and the Right to Strike*: The origin and general scheme of the Railway Labor Act was recently outlined by this Court:

> The Railway Labor Act of 1926 "cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 751 (1945) (Frankfurter, J. dissenting). Following decades of labor unrest that persistently revealed the shortcomings of every legislative attempt to address the problems, representatives of railroad labor and management created a system for dispute resolution that Congress enacted as the RLA. The RLA subjects all railway disputes to virtually endless "negotiation, mediation, voluntary arbitration, and conciliation." *Detroit & Toledo Shore Line R. Co. v. Transportation Union*, 396 U.S. 142, 148-49 (1969). Moreover, the RLA requires all parties both "to exert every reasonable effort to make and maintain" collectively bargained agreements, § 2 First, and to abide by the terms of the most recent collective bargaining agreement until all the settlement procedures provided by the RLA have been exhausted, §§ 5, 6, 10; see *Shore Line*, *supra*, at

> 150-53. Nevertheless, if the parties exhaust these procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an emergency board under § 10 of the RLA. [*Burlington N. R.R. v. B.M.W.E.*, —— U.S. ——, 107 S. Ct. 1841, 1850-51 (1987) (footnotes omitted)].

See also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969) ("Implicit in the statutory scheme . . . is the ultimate right of the disputant to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.'")

An integral part of this scheme is the protection of the right to strike, as this Court has explicitly held:

> The Court has indicated, without reference to the National Labor Relations Act, that employees subject to the Railway Labor Act enjoy the right to strike over major disputes. In *Brotherhood of Railway and Steamship Clerks Freight Handlers Express & Station Employees, AFL-CIO v. Florida E. C. R. Co.*, 384 U.S. 238, 244 (1966), we held that:
>
> > "The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided."
>
> Similarly, in *Florida E. C. R. Co. v. Brotherhood of Railroad Trainmen*, 336 F.2d 172, 181 (1964), the Court of Appeals for the Fifth Circuit concluded that "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [party]. On the side of labor, it is the cherished right to strike." *Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme of the Act as a whole, it is integral to the Act.* [*Brotherhood of R.R. Trainmen v. Jacksonville*

Terminal Co., 397 U.S. at 384-85 (emphasis supplied)].

See also id. at 386 ("Peaceful primary strikes . . . lie within the core of protected self-help under the Railway Labor Act.")

Contrary to the contention on the other side (TWA Br. 19-21; Brief of *Amicus Curiae* The Airline Industrial Relations Conference at 5-6 n.2; Brief for the National Labor Relations Board ("NLRB Br.") at 16-17 n.10), this "core" RLA right, which *Jacksonville Terminal* held is not defeasible through state regulation, may not be defeated through employer coercion either.[13] Section 2 Fourth of the RLA provides *first* that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing," and *second* that

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . *or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.* [Emphasis supplied].[14]

This provision, and the italicized language particularly, is closely analogous to § 8(a)(3) of the National Labor Relations Act, as amended, which provides:

> It shall be an unfair labor practice for an employer . . . [b]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In construing § 8(a)(3), this Court has made clear that "membership in any labor organization" includes not only the bare act of joining but, as well, "the right . . . to join in or abstain from union activities without thereby affecting his job." *Radio Officers Union v. NLRB*, 347 U.S. 17, 42 (1954). Thus,

> Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," which includes discouraging participation in concerted activities . . . . *such as a legitimate strike.* [*NLRB v. Erie Resistor Corp.*, 373 U.S. at 233 (emphasis supplied)].

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[13] Indeed, this Court in *Jacksonville Terminal* regarded as the more difficult question not whether the right to strike is protected from coercive employer actions but whether, as held in that case, the right to strike is *also* protected from state regulation:

> It has been suggested that [§ 2 Fourth] is "comparable to § 7 of the NLRA, which grants employees the right to "self-organization" and the right to engage in "concerted activities" and which, even apart from § 13, protects the right to strike, see, *e.g.*, *Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 389 (1951). . . . *However, § 2 Fourth was designed primarily, if not exclusively, to prohibit coercive employer practices.* [394 U.S. at 385 n.20 (emphasis supplied)].

See id. at 382 n.17 (distinguishing between "employee conduct which the States may not prohibit" and "conduct against which the employer may not retaliate"; the question in *Jacksonville Terminal* concerned state regulation, not employer coercion.)

[14] That § 2 Fourth was intended to include, within its proscription against "influenc[ing] or coerc[ing] employees," adverse employer actions affecting employees' job rights is both apparent from the breadth of the language used and explicit in the legislative history of the RLA. *See, e.g., Hearings on S.3266 Before the Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934) 13, 14-15, (statements of Joseph B. Eastman, Federal Coordinator of Transportation) ("influence . . . may be exerted after he becomes an employee by instilling in him the fear that if he does not do as the company wishes he may lose his job"). Indeed, this point is not in dispute; we do not understand TWA or its amici to maintain, for example, that if an employee were fired because he helped to organize a new union, the employee would have no recourse under § 2 Fourth. Rather, the contention seems to be that once a labor organization is in place and recognized by a carrier, the RLA provides no protection of any kind against employer retaliation for participating in the activities of that organization.

It is apparent that when Congress added § 2 Fourth to the RLA in 1934 and prohibited employers from coercing employees "in an effort to induce them to join or remain or not to join or remain *members* of any labor organization" (emphasis supplied), Congress had in mind essentially the same concept of what it means to protect union membership as the concept embodied in the NLRA just one year later. *Cf. Communications Workers v. Beck*, —— U.S. ——, 56 L.W. 4857, 4860 (June 29, 1988).[15]

The basic object of the 1934 RLA amendments was to provide *added* protection against employer interference with the internal organization and activities of unions, going beyond the protection in the choice of representative extended by the 1926 Act. S. Rep. No. 1065, Part 1, 73d Cong., 2d Sess. (1934) 2, *reprinted in* Committees on Labor & Public Welfare, United States Senate, *Legislative History of the Railway Labor Act as Amended ("RLA Leg. Hist.")* (1974) 821; H.R. Rep. No. 1944, 73d Cong., 2d Sess. (1934) 2, *reprinted in RLA Leg. Hist.* 919. Section 2 Fourth was added as a means toward that end. Indeed, to read the new section as dealing only with the protection of precertification organizing activities, would be to make the provision entirely redundant, since the preexisting § 2 Third already provided that protection.

Moreover, exercise of the right to strike had, by the time of the 1934 RLA amendments, long been recognized as perhaps the central reason for organizing unions in the first place, and a necessary concomitant of union membership:

> Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. *They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them.* [*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921) (emphasis supplied)].

[15] The Railway Labor Act as passed in 1926, Public Law No. 69-257, 44 Stat. 577 (1926), included a version of § 2 Third somewhat different from the one in the current Act, and did not include the equivalent of § 2 Fourth.

To protect employees from employer retaliation for organizing unions, but not to protect them from such retaliation when they take one of the very actions it is the purpose of unions to promote and which is at the "core" of the RLA statutory scheme, would have been a senseless endeavor.[16]

Thus, § 2 Fourth does protect employees from coercive employer action burdening the right to strike. The question in this case is whether, given the overall structure of the RLA, an employer violates that prohibition by promising post-strike job protection to employees so that those employees will abandon collective strike activity, thereby undermining the "laborers[']opportunity to deal on equality with their employer" (*American Steel Foundries*, 257 U.S. at 209).

[16] That the RLA contains no language like § 2(3) of the NLRA explicitly including strikers within the definition of "employees" does not signify that strikers are not "employees" within the meaning of the RLA, as petitioner implies. (TWA Br. 19). On the contrary, this subject was specifically discussed in the RLA's legislative history, where it was unequivocally stated, by a member of the union/industry committee that drafted the RLA (*see* n.17, *infra*), that "the mere fact of a strike does not terminate the [employment] relationship." *Railroad Labor Disputes: Hearing on H.R. 7180 Before the Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 397 (1926) (statement of Donald R. Richberg, Counsel for the Organized Railway Employees). As Mr. Richberg also stated, this understanding was consistent with judicial rulings at the time. *Cf., e.g., Michaelson v. United States*, 266 U.S. 42, 67 (1924).

2 *The RLA and Employer Self-Help During Strikes*:

A. To recognize that the RLA, like the NLRA, protects the right to strike from coercive employer action is not to determine that the two statutes must be applied identically when questions arise concerning whether the right to strike has been unduly burdened. Rather, as this Court recognized in *Jacksonville Terminal*, while the RLA and the NLRA each protect the right to strike, the precise content of that protection varies because of differences between the two statutes concerning the precise role of self-help generally, and of strike activity particularly:

> [T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. *Cf. Brotherhood of Railroad Trainmen v. Chicago River & I.R. Co.*, 353 U.S. 30, 31 n.2 (1957).
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> • • •
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> [A]lthough, in the absence of any other viable guide, we have resorted to the NLRA for assistance in mapping out the general boundaries of self-help under the Railway Labor Act, *there is absolutely no warrant for incorporating into the Act the panoply of detailed law developed by the National Labor Relations Board and Courts. . . .* [*Jacksonville Terminal*, 394 U.S. at 383-84, 392].

We hasten to add that *Jacksonville Terminal's*, as well as *Burlington N. R.R.'s*, recognition that the RLA permits a broader range of secondary union activity than that permitted by the NLRA cannot be extrapolated to any general proposition supporting TWA's position in this case.

Those two cases do *not* indicate that once the various status quo periods contained in the RLA are exhausted, the scope of employer or employee self-help in the RLA is unlimited by the statute. To the contrary, in those two cases, the Court declined to imply into the Act a limitation

upon self-help that had no basis in the statute. As the Court stated, the RLA "allow[s] parties who have unsuccessfully exhausted [its] procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*" *Jacksonville Terminal*, 394 U.S. at 392-93 (emphasis supplied).

Section 2 Fourth, as we have seen, does place an express limit upon the employer's power to enforce its will through use of its economic power over its employees' livelihood. The question in this case is whether TWA's actions, which indubitably *did* "influence or coerce employees in an effort to induce them" not to participate in the collective strike effort (*see* pp. 16-19, *supra*), violated the statute on this ground, or whether there is some privilege implicit in the statute permitting TWA to engage in this particular coercive activity as part of the self-help available when the statutory procedures designed to promote agreement have failed. Thus, this case, unlike *Jacksonville Terminal* and *Burlington N. R.R., does* involve "construe[ing] a particular provision of an Act in light of the Act's structure and purpose . . .," (*Burlington N. R.R.*, 107 S. Ct. at 1854 n.15), and is for that reason well within the realm of judicial competence.

B. There is, of course, no explicit answer to this question in the statute. But this is not surprising: The RLA was intentionally written in generalities, in the belief that " 'there is more danger in attempting to write specific provisions into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed . . . .' " *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570, 577 (1971), *quoting* Hearings on the Railroad Labor Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926). Following this approach and looking at the overall structure

of the RLA as construed by this Court, several interrelated principles emerge for determining when employer action that has the effect of discouraging or defeating a strike will be considered action violative of the § 2 Fourth of the RLA because that action "influence[s] or coerce[s] employees in an effort to induce them" to forego their right to strike, or to cease striking once they have begun.

(i) First, the overall goal of the RLA is "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T. S.L. R.R. v. United Transportation Union*, 396 U.S. 142, 149 (1969). The framers of the RLA took a subtle and long range view of how best to accomplish this goal.[17] Largely on the basis of the failure of earlier railroad legislation that had taken more authoritarian approaches, the framers eschewed compulsory arbitration on the one hand and prohibition of strikes on the other. Hearings before the Senate Committee on *Interstate Commerce* on S2306, 69th Cong., 1st Sess. (1926) 186: S. Rep. No. 606, 69th Cong., 1st Sess. 4 (1926), *reprinted in RLA Leg. Hist.* 103. Instead, the RLA endeavors, in the first place, to delay the use of economic self-help as a means of settling labor disputes in the hope that the delay itself, and the aids to consensual resolution available during the status quo periods, will encourage peaceful settlement of disputes. *Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. at 149-50. And secondly, in an attempt to "create an atmosphere in which rational bargaining can occur" (*Detroit & T.S.L. R.R. v. United Transportation Union*, 396 U.S. at 150), not only as to the present dispute but as

[17] As this Court has had frequent occasion to note, the Railway Labor Act was "legislation agreed upon between the railroads and the [national railroad unions] and [was] probably unique in having been frankly accepted as such by the President and Congress." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 753 (1945) (Frankfurter, J., dissenting). *See, e.g., Detroit & T.S.L. R.R.*, 396 U.S. at 148 ("railroad and union representatives drafted the Act"); *Burlington N. R.R.*, 107 S. Ct. at 1852 n.13.

to future ones as well, the RLA establishes a system designed to limit the likelihood that such strikes as do occur will rupture or negatively affect the post-strike relationship between the employer and the labor organization representing its employees.

The "strike represents only an interruption in the continuity of the relation," and not an invitation for "labor-management relations to revert to the jungle." *Brotherhood of Ry. & S. C. v. Florida E. C. Ry ("F.E.C.")*, 384 U.S. 238, 246-47 (1966). The "assumption as well as the aim of the Act is a process of *permanent* conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Elgin, J & E. Ry. v. Burley*, 325 U.S. at 753 (Frankfurter, J., dissenting) (emphasis supplied).[18]

It is particularly noteworthy for present purposes that the main reason for amending the RLA to cover the airline industry in 1936 rather than including that nascent industry under the then-new NLRA was precisely the belief that the RLA is superior in fostering the stability of labor relations. Thus, the primary proponent of the bill to cover airlines under the RLA argued to the House Committee considering the bill:

> The success of the Railway Labor Act in not only avoiding a break-down in labor relations in the railroad industry but also in making for healthy and stable labor relations is attested to by the experience under the act since its approval in 1926 . . . . Would not this same purpose be accomplished if the air-transport industry and its employees were made subject to the proposed National Labor Relations Act—S. 1958—instead of the Railway Labor Act? The answer is to be found in the difference between the two statutes.
>
> The proposed National Labor Relations Act is confined chiefly to safeguarding the right of employees

[18] Justice Frankfurter's opinion in *Elgin*, albeit a dissent, insofar as it outlines the history and overall theory of the RLA has been repeatedly relied on by this Court, most recently in *Burlington N. R.R.* *See* p. 14 *supra*, quoting 107 S.Ct. at 1850-51.

to organize for the purpose of collective bargaining. . . . The act as proposed, while it seeks to encourage duly chosen representatives of employers and employees to bargain collectively, does not provide for the orderly processes of notice, conference, mediation, arbitration, fact-finding, and conciliation available in the event of a labor dispute in those industries subject to the Railway Labor Act. *In an industry such as air transportation, so largely charged with responsibility to the public, and in which safety is such a large element, it is of special importance that every legal safeguard which long experience in labor relations has shown to be workable should be adopted by way of insurance against lowering of the morale of the service and break-down in labor relations.* This purpose would be accomplished for the air-transport industry by the Railway Labor Act. [*Hearings on S. 2496 Before the Committee on Interstate Commerce*, 74th Cong., 1st Sess. (1935) 21 (emphasis supplied) (remarks of Mr. Beyer).]

(ii) In particular, in attempting to contain the damaging impact of occasional episodes of economic warfare upon the overall stability of labor relations between an employer, his employees and their chosen union, the RLA preserves the "continuity of the relation" (*F.E.C.*, 384 U.S. at 246) in three ways.

First, the statute attempts to focus the use of economic weapons upon the substantive matters that were actually in dispute, rather than permitting the parties to broaden the conflict during the economic warfare period beyond those particular issues that had given rise to the dispute in the first place. Thus, for example, with one limited exception (*see* discussion of *F.E.C.*, *infra* pp. 30-32) an employer may *not* change collectively-bargained wages, rules, or working conditions unless notice is given as to the particular change requested, and the statutory negotiation and mediation processes are exhausted (*see* § 2 Seventh; § 6)[19]:

[19] Additionally §2, First, "the heart of the Railway Labor Act" (*Jacksonville Terminal*, 394 U.S. at 378-79), independently imposes upon management and labor the obligation 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of the carrier growing out of any dispute between the carrier and the employees thereof." That obligation as well circumscribes the use of economic weapons by preventing the introduction of new substantive disputes during the self-help period.

This Court has long recognized that there is a fundamental incompatibility between an obligation to engage in good faith bargaining with a union and the act of unilaterally imposing upon employees a wage or term of employment not first presented to the exclusive representative for consideration at the bargaining table. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 223-25 (1949); *NLRB v. Katz*, 369 U.S. 736 (1962). The National Labor Relations Board with the approval of this Court has recognized that this principle is of sufficient weight to support an implicit, albeit limited, status quo requirement in a statute which, in contrast to the RLA, does not state in terms an express requirement that working conditions must be maintained while the bargaining process goes forward. *Katz, supra; Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (working conditions may be changed only "after bargaining to an impasse, that is, after good faith negotiation have exhausted the prospects of concluding an agreement," and then only "by making unilateral changes that are reasonably comprehended within [the] pre-impasse proposals.").

Analogously, this Court has previously noted that apart from the more explicit status quo requirements in the RLA, there is as well an "implicit status quo requirement in the obligation imposed upon both parties by § 2 First, to exert every reasonable effort to settle disputes without interruption to interstate commerce." *Detroit and Toledo Shore Line RR, supra*, 396 U.S. at 151. *See Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971).

The difference between the NLRA's implicit status quo requirement and the RLA's express requirement is, of course, that while the NLRA largely permits the parties to set their own parameters for time and extent of bargaining, the RLA goes on to prescribe, in §§ 5, 6, and 10 of the Act, the steps to be followed in endeavoring to reach agreement and in so doing defines the significant, time consuming obligations to be met during that period.

Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use

> the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures. [*F.E.C.*, 384 U.S. at 247].

And, of course, by necessary implication, a union may only strike over issues as to which it has exhausted the statutory procedures, and not over demands the union has never presented to the employer for consideration.

As a consequence, under the RLA, even during the self-help period, except for those wages, rules, and working conditions that are in dispute (and except for certain, "reasonably necessary" changes that an employer receives permission temporarily to alter during a strike, *see F.E.C.*, 384 U.S. at 246), *the workplace is governed during and after any strike by the terms of the agreement in place when the dispute began*, (*id.* at 245; *id.*, at 249 (White, J., dissenting) ("The Court agrees that § 2 Seventh forbids the carrier itself to make any changes in the contract other than those on which bargaining has taken place.")). Thus, "collective bargaining agreements [which] are the product of years of struggle and negotiations . . . [and] represent the rules governing the community of striking employees and the carrier" are preserved and the workplace "community is not destroyed by the strike." *F.E.C.*, 384 U.S. at 246.[20]

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[20] As noted (n.2, *supra*), *TWA I*, 809 F.2d 483 (8th Cir. 1987) was affirmed by an equally divided Court. Because the briefs in that case discussed at length the limits upon the parties' self-help imposed by the very specific bargaining obligations imposed by the RLA, with one exception, we do not repeat those arguments here.

One of the central issues in *TWA I* was whether the agreement in that case terminated by its own terms or whether, as both the district court and the court of appeals in that case held, and as the district court has since reaffirmed, the language of the duration clause indicated only that the agreement could be amended, but not terminated. *IFFA v. TWA*, 682 F. Supp. 1003, 1006 (W.D. Mo. 1988) (the parties generally referred to the duration date in the contract, July 31, 1984, as the "amendable date"); *IFFA v. TWA*, No. 86-6030–CV-SJ-6 (W.D. Missouri) Order Granting Partial Summary Judgment on Striker Rights to Flight Service Manager Positions (May 26, 1988) 11 ("the 'amendable' nature of the contract the parties chose to sign . . . has been solidly reconfirmed in the negotiating history I heard after the dues decision [*TWA I*].)" (These statements were made by the District Court following 30 days of trial in No. 86-6030 regarding allegations that TWA had breached its obligations under RLA § 2 First in the negotiations that led to the strike.)

In *TWA I*, it may have made a difference whether the terms of the prior agreement that were not in dispute carried forward into the post-status quo period as a matter of contract, or as a matter of statute (or both). The reason this distinction came into play is that TWA argued there (in the narrower of its two major contentions) that whatever may be the case as to terms and conditions of employment generally, union security provisions could continue forward into the post-impasse period *only if there was a continuing collective agreement*. As TWA read § 2, Eleventh of the RLA, the statute particularly so requires *with respect to union security clauses*. *See*, disagreeing with this contention, *TWA v. IFFA*, No. 86-1650, Respondent's Brief at 39-45; *id.*, Brief of the AFL-CIO as amicus curiae at 19-22.

In this case however, the question of whether there are special rules that affect union security clauses is not implicated. Moreover, regardless of how the contract might be construed, here it is enough that provisions of the statute itself—in particular § 2 First and § 2 Seventh of the RLA—of their own force ordinarily forbid the parties to alter contractually-established terms and conditions

Second, as a necessary part of the preservation of the workplace "community" under the RLA, "the Railway

Labor Act is more concerned [than the NLRA] with continuance of the employer-employee relationship." *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320, 329-30 (5th Cir. 1968) (Wisdom, J.). *See also National Airlines v. International Ass'n of Machinists*, 416 F.2d 998, 1004 (5th Cir. 1969); *Empresa Ecuatoriana de Aviacion v. District Lodge*, 690 F.2d 838, 845 (11th Cir. 1982) ("the policy of the Act . . . is to keep the employer-employee relationship intact").[21]

The safety concerns that underlay the addition of airlines to the RLA are particularly served by this continuity of employment principle. Frequent or mass turnover in the workforce is hardly calculated to provide "insurance against lowering of the morale of the service." *See* pp. 23-24, *supra*. Thus, one goal of the RLA as applied to the airlines is to promote the retention of the seasoned employees most likely to protect the public interest in safety. *See* H.R. Rep. No. 2243, 74th Cong., 2d Sess. (1936) 3, *reprinted in RLA Leg. Hist.* 1052; S.Rep. No. 895, 74th Cong., 1st Sess. 1 (1935), *reprinted in RLA Leg. Hist.* 1039 ("all that can be said for the need of able, alert, well-trained and responsible employees to man the railroads of the country applies with at least equal force and effect to the employees required to man the air lines of the country; and by the same token, anything which makes for stability in the labor relations and good morale

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of employment other than by the use of procedures prescribed in § 6 of the Act. *See TWA I* Brief for Respondents 20-30, 37-39; *id.*, Brief of the AFL-CIO as amicus curiae at 5-10.

[21] Because of the RLA's special concern for continuity of the employment relationship, *National Airlines* held inapplicable to the RLA the NLRA rule that employers may discharge employees who engage in illegal strikes or other unprotected conduct. 416 F.2d at 1004. "To allow the carrier to discharge all employees who strike in violation of the Railway Labor Act would undermine the Act's emphasis on the continuance of the employer's operations and the employer-employee relationship." *Id.*

of the railroad industry applies also to the flying industry").[22]

Finally, an essential concomitant of the special RLA concern for stable labor relations is continuity of bargaining relations generally, through protection of the ability of the bargaining representative effectively to represent employees:

> A primary purpose of the major revisions made in 1934 was to strengthen the position of the labor organizations *vis-a-vis* the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and *effective* labor organizations. . . . [I]n prescribing collective bargaining as the method of settling railroad disputes, in conferring upon the unions the status of exclusive representative in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjust grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. [*International Association of Machinists v. Street*, 367 U.S. 740, 759-60 (1961) (emphasis supplied)].

It is because "this railroad labor code was . . . infused with the purpose of securing self-adjustment between the effectively organized railroad unions and *the equally effective railroad unions*" (*Elgin, supra*, 325 U.S. at 752 (Frankfurter, J., dissenting, *quoted in Street*, 367 U.S. at 760 (emphasis supplied)) that the statutory scheme endeavors to prevent employer actions calculated to undermine the sta-

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[22] Similarly, on the railroads, the RLA's goal was to create "an instrument of government" for a stable workforce:

> The railroad world is like a state within a state. Its population of some three million, if we include families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . [*Elgin, J. & E. Ry. v. Burley*, 325 U.S. at 751-52 (Frankfurter, J., dissenting) (quoting Garrison, The Railroad Adjustment Board: *A Unique Administrative Agency*, Yale L.J. 567, 568-69 (1937)).]

bility of the union selected by the employees as their exclusive representatives.

(iii) While preserving the continuity of labor relations across any self-help period in these three ways, the RLA does not, of course, disable employers from responding to employee strike action by deploying economic weapons of their own. The Act does, however, require that such responses respect the basic statutory preference for labor relations stability generally, and for continuity of working conditions, continuity of employer-employee relationships, and continuity of the bargaining relationship specifically.

For example, obviously inherent in a statutory scheme that relegates the disputants to a test of economic strength after attempts to reach a consensual agreement have failed is the notion that it cannot be a violation of the statute without more to prevail in that economic struggle. *Cf. American Ship Building Co. v. NLRB*, 380 U.S. 300, 313 (1965). Thus, insofar as an employer self-help tactic is to maintain operations in order to improve the employer's economic position during the strike, the fact that such operations may prolong the strike, leave the employees without income for a long period of time, and induce the union eventually to call off the strike without achieving the union's economic goals because the members can no longer afford to be without work cannot add up to a violation of § 2 Fourth.

It is to be observed, however, that such a tactic, standing alone, does not renounce the existing terms and conditions of employment for the post-strike period, reconstitute the workforce permanently, or undermine the solidarity of the employees in their support for their labor organization. Rather, the impact is *temporary*, and is on the *striking workforce as a whole*; there is no necessary purpose or effect to split off individual employees from the group, and thereby to undermine the ability of the employees to act collectively either as to this particular dispute or as to future disputes.

There is, in addition, a second basis under the RLA for recognizing an employer's right to continue operations during a strike. Under the statute

> The carrier's right of self-help is underlined by the public service aspects of its business. "More is involved than the settlement of a private controversy without appreciable consequences to the public." . . . In our complex society, metropolitan areas might suffer a calamity if rail services for freight or for passengers were stopped. . . . [This is] not to say that the carrier's duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy. [*F.E.C.*, 384 U.S. at 245].

As the Court in *F.E.C.* went on to hold, this obligation to attempt to operate during a strike justifies, under the RLA, certain limited inroads into the stability of labor relations that is at the core of the statute. In particular, a carrier is entitled to 'improvise[] and employ[] an *emergency* labor force" (384 U.S. at 246, emphasis supplied), and may seek court approval *temporarily* to alter those contractually-established working conditions that are not the subject of the underlying dispute but that make operation with a less numerous, temporary workforce impossible (*id.* at 246).

At the same time, and critically for present purposes, the Court in *F.E.C.* ruled that any such accommodation of the RLA's basic stability premises to an employer's needs in attempting to operate during a strike "must be closely confined and supervised." 384 U.S. at 246. Toward this end, the Court made clear that any such accommodation should be, if possible, temporary rather than permanent:

> [A]uthorization to deviate in part from the collective bargaining agreement would, as FEC readily

> concedes, terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force. [384 U.S. at 247].

And any such accommodation of the employer's needs in operating during a strike must be substantively and procedurally limited as well:

> While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored. The Court of Appeals used the words "reasonably necessary." We do not disagree, provided that "reasonably necessary is construed strictly. The carrier must . . . make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it. [384 U.S. at 247-48].

By recognizing these limitations upon the employer's use of economic weapons, the Court moved to assure the greatest possible preservation of: (1) the "rules governing the community of striking employees and the carrier" (384 U.S. at 246); (2) the "community" of employees itself (*id.*, at 246-47) ("the community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation"); and (3) the labor-management community expressed in the bargaining relationship (*id.*, at 247) (the power to change employment conditions during a strike must be strictly confined so as to avoid a temptation "to prolong the strike and even break the union").

3. *The RLA and the Distribution of Post-Strike Jobs*:

The course TWA pursued in maintaining operations during the 1986 strike threatened the very RLA stability principles the Court in *F.E.C.* sought to preserve through careful supervision of employer self-help during a strike. And there has been no showing that the standards for justifying such destabilizing practices during strikes has been met here.[23]

A. *First*, by refusing reinstatement to full-term strikers more senior than the crossovers who retained those positions, while maintaining an overall seniority system, the company fundamentally interrupted the continuity of terms and conditions of employment from the pre-strike to the post-strike period.

In the structure established by the TWA-IFFA collective bargaiinng agreement, and in effect during the post-strike period by virtue of the statute (*see* pp. 24-26, *supra*), seniority "expresses in a form appropriate to particular industrial situations the notion that people acquire property-like rights in employment opportunities." Meyers, *The Analytic Meaning of Seniority*, in Proceedings of the Eighteenth Annual Meeting, Industrial Relations Research Ass'n. (1966) at 8. In this instance, seniority carried with it the general privilege to retain employment over more junior employees when there were not enough active jobs to go around,[24] as well as the privilege

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[23] The discussion in the text assumes that the replacement of strikers by outside permanent replacements was proper because "reasonably necessary" to enable the employer to operate during the strike, but does so only on the basis the union has yet to prove otherwise. *See* n.5, *supra*. On the principles generally advocated in the text, however, the second cause of action could go forward, and IFFA would be put to its proof on the question whether, as the complaint alleged, TWA could have attracted sufficient temporary replacement flight attendants to operate without promising job retention at the conclusion of the strike.

[24] The contract accomplished this result by providing (1) that senior employees, if furloughed, could displace more junior employees in order to retain paid status; and (2) that on return from voluntary leaves, more senior employees could displace more junior employees. (Stipulations, Exhibit 1, Art. 15D & E, pp. 91-92).

to obtain the more favored domiciles and classifications over more junior employees.

Had these principles been followed in distributing post-strike positions among the original members of the striking bargaining unit, the result would *not* have been to displace all the crossovers, but rather to return matters to what they would have been, as among the group of employees who determined collectively to strike in support of their bargaining position, had there been no strike. The result of TWA's policy, in contrast, is to recalibrate the internal relationship among the members of the prestrike workforce so that benefits and burdens after the strike—most importantly, an immediate position in the active workforce—are arranged in part on the basis of the degree of fealty to the company, rather than upon the neutral seniority principle. The effect, as in other instances in which a generally applicable seniority rule is ignored, is necessarily "disruptive and demoralizing . . . , for it [is] viewed as depriving employees of rights earned in accordance with a just principle . . . [and] as taking rights away from one person and giving them to another." Summers & Love, *Work Sharing As An Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U.Pa.L. Rev. 3, 893, 903-04 (1976).

That the collective bargaining agreement did not in terms provide for reinstatement of strikers according to seniority (App. Cert. 22) is not relevant in this context. Collective agreements in general address the "community" of employees and employer as the community ordinarily functions; strikes are an "interruption in continuity of that community" (*F.E.C.*, 384 U.S. at 247), and, thus, are not generally covered in terms by the agreements. That is why, presumably, the agreement in *F.E.C.* had no provision for suspension of any of its working rules in the event of a strike. The Court in *F.E.C.*, nonetheless held that the *RLA itself* preserves the contractually-established pre-strike working relationships *to the degree reasonably possible*, in order to preclude any fundamental

dislocation between the pre-strike and post-strike employment world by reason of the strike.

By a parity of reasoning, the RLA should be read to require that as among the members of the employee group who worked under the pre-existing agreement and determined collectively to exercise their statutory right to strike, the immediate post-strike employment positions should be distributed according to the same general seniority principles that, before the strike, governed analogous situations in which there were more employees available than work. To do otherwise is to deny "expectations reinforced by a sense of rightness of the basic principle of length of service." Summers & Love, *supra*, at 904.[25]

Second, TWA's program for distributing post-strike positions in the active workforce significantly impairs the

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[25] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1940) is suggestive in this regard. *Fishgold* involved the application of a veteran's statute protecting the right of veterans to return to their pre-strike employment position "without loss of seniority" and "as having been on furlough or leave of absence" during their service in the armed forces. 328 U.S. at 284. The Court recognized that individuals on furlough or leave remain employees, have "a continuing relationship with the employer" and "retain[] a right to be restored to work under specified conditions." 328 U.S. at 287.

In defining the employment "position" of an employee in a workplace in which seniority generally governs the determination of who is on furlough or leave and who is not, the Court held that such a "position" is defined in large part by its rank in the seniority scale, so that a return veteran retains his "position" as long as he is "entitled to be recalled to work in accordance with his senority," even though there is, at the moment he returns to work, no active, paid work available for persons of his seniority rank. 328 U.S. at 287-88.

On the other hand, the Court indicated that to award the returning veteran a job in the paid, active workforce to which his seniority would *not* entitle him would be to grant him preference over other workers in the form of "a gain or step-up in seniority." 328 U.S. at 286. This was so as a matter of law, whether or not the collective bargaining agreement which created the seniority rights in the first place expressly covered the problem of return from the armed services.

"employer-employee relationship" contemplated by the RLA. While the permanent replacement of strikers with individuals from outside the workforce is not directly pertinent here (*see* n. 23, *supra*), such replacement obviously threatens a fundamental break in the "employer-employee" relationship as between the pre-strike and post-strike periods by adding to the workforce large numbers of additional employees and giving those individuals the active, paid positions over many pre-strike workers. Even if that disruption can itself be justified as "reasonably necessary" given the need to attract new employees through the promise of permanence—a question that would be open on remand in this case under Count II of the Complaint (*see* n.5, supra)—it is a disruption that the Act surely disfavors. As such, the disruption caused by this break in the pre-existing employer-employee relationship should be "strictly confined if the spirit of the Railway Labor Act is to be honored." *F.E.C.*, 384 U.S. at 248.

Consistent with that principle, the employer-employee relationship with regard to the active positions still available after the permanent replacements are accounted for should not be further disrupted. And, disadvantaging those employees with longer-term employment who did not abandon the strike during its course, in favor of more junior employees who did abandon the strike effort plainly constitutes such a further disruption. That practice removes from the workplace the most seasoned employees, replacing them with individuals with less work experience and less of a long-term commitment to the work force.

Finally, and of great significance, TWA's program for according junior crossovers priority over senior full-term strikers fundamentally destabilized the bargaining relationship between TWA and IFFA. That program, unlike the simple assurance of permanence to outside replacements, set up a competition *among* those individuals who participated in the original decision to strike, and thereby undermined the group's ability to take the

collective action that it is the very purpose of the statute to protect. As such, the crossover policy threatened the viability of the strike, and of future efforts at collective action, in a way quite different from the effect of permanent replacement *simpliciter*: While permanent replacement may lead to a *collective* decision to abandon the strike because of the fear that more and more post-strike jobs for the original strikers are being lost, a permanent replacement policy, standing alone, does not encourage *individual* decisions to split off from the group unless it is combined with a reward—post-strike job retention—for those who make such a decision. Cf. *Air Line Pilots Association v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986) (under *F.E.C.*, an employer must show reasonable business justification before implementing self-help measures that "on their face, undercut the union's ability to function as an effective representative for its members.")

B. Under *F.E.C.*, it is possible that these detrimental impacts upon the RLA's labor stability policy, as well as the facial violation of § 2 Fourth involved, could possibly be justified if the employer had met its burden of demonstrating to a court that its crossover policy was "truly necessary" (384 U.S. at 248) in order to operate during the strike. In this instance, however, the employer made the promises of permanence to both the outside replacements and the crossover without first making any attempt to attract either *temporary* replacements or crossovers who were *not* promised exemptions from neutral seniority rules. *F.E.C.* makes it plain that the fact that it may have been *easier* to attract both replacements and crossovers by promising retention in the face of the seniority system after the strike is insufficient in itself under the "reasonably necessary" test, and that the employer has the burden of showing that employment offers subject to the seniority system would not have sufficed.[26]

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[26] It is worth noting that, as *Fishgold, supra*, makes clear, an offer of a position that includes the prospect of being displaced by

Moreover, whatever may be the case with respect to outside permanent replacements (*see* 43-44, *infra*), the employer can not meet that burden by invoking a presumption that crossovers would not return to work absent a promise of retention in the active workforce at the strike's end.

In the first place, the job the crossovers left is the job to which they are free to return. Thus, in deciding whether to return to employment during the strike, crossovers, unlike replacements, are not giving up their regular employment (or their search for regular employment) but are reclaiming such employment. The employer, therefore, has no need to offer permanence in order to induce a crossover to give up a *different*, permanent job.

In addition, the *basic* economic power the employer has over the strikers is that as long as the strike continues, the strikers are deprived of their livelihood. This Court has always understood that this employer power constitutes a powerful inducement in itself to abandon a strike, whether individually or collectively. Thus, in elaborating upon the reasons that an employee who at first supported a strike effort might change his or her mind, this Court alluded to "the specter of hardship to his family," and to the fact that "the ease with which the employer replaces the strikers may make the strike seem less provident," presumably because of the likelihood that the employer will be able to operate for a long time without the strikers and thereby increase the "specter of hardship" even more. *NLRB v. Granite State Joint Bd.*, 409 U.S.

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a more senior person is still an offer of permanent employment. "An employee on furlough or leave of absence . . . retains a right to be restored to work under specified conditions. . . A 'position' exists even though no work is then available." 328 U.S. at 288. The question in this case, thus, is not whether the crossovers or the strikers should obtain permanent positions but, *as among* permanent employees, who shall be in the active workforce on the day after the strike ends and who shall await vacancies in paid positions through attrition or economic expansion.

213, 218 (1972); *see also American Steel Foundries*, 257 U.S. at 209.

Consequently, while there may well be a basis for erecting a presumption that offers of permanence to outside replacements are "truly necessary" in order to operate during a strike and placing the burden to prove otherwise on the injured full-term strikers or their union,[27] there is no basis for any such presumption with regard to crossovers. Rather, as in *F.E.C.*, the burden must be on the *employer* to prove to a court that such disruption as will be caused by its plan for operations during the strike is "reasonably necessary . . . construed strictly." 384 U.S. at 248.

Where, as here, no attempt was made to operate *without* granting preference to crossovers—nor was any attempt made, by analogy to *F.E.C.*, to obtain court approval of the preference acccorded corssovers by demonstrating that the preference was "truly necessary" to obtain sufficient employees to operate during a strike—as a matter of law, that standard has not been met and the judgment below must be upheld.[28]

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[27] This is the theory of Count Two of the Union's Complaint in this case: The lack of a "legitimate and substantial" business justification is alleged as part of the union's affirmative case. (App. Cert. 55).

[28] We note that while TWA argues repeatedly that such a result is anomalous in that it gives permanent replacements from outside the workforce preference over returning strikers, that result is not at all anomalous. Under the approach for which we argue, the same basic analysis would apply to outside replacements and to crossovers. The differences that result come about because when the problem is looked at in terms of the *F.E.C.* analysis—and of the purposes that analysis serves—in the case of permanent replacements, a presumption of necessity may be appropriate. The fact that application of a single basic standard to diverse circumstances may lead to diverse results is not surprising and does not undermine the force of our analysis.

III. This Court's Cases Decided Under The NLRA, Insofar As They Are Relevant To The RLA Context, Are Consistent With The Proposition That TWA's Promise Of Preference To Crossovers Over More Senior Strikers As Illegally Coercive Of The Right To Strike.

Petitioner, and, for the most part, its amici, ignore in their arguments the pertinent RLA considerations discussed above, and base their presentations instead upon NLRA precedents. Their argument, put succinctly, is that *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), creates an employer privilege to offer permanent positions to strike replacements; that this privilege is an absolute one, and does not require any showing that the promise was necessary to continue operations during the strike; that the privilege applies equally to crossovers and to replacements from outside the bargaining unit; and that the privilege applies despite any detrimental impact its exercise may have upon post-strike relationships between employees arising from the disruption of seniority relationships that ordinarily govern the distribution of work, benefits and burdens in a particular workplace. The fatal defect in this analysis is that while the first premise is true, the second, third, and fourth premises have never been approved by this Court, and are in large part inconsistent with the reasoning in this Court's cases.

1. In *Mackay*, this Court established *two* principles relating to the reinstatement of strikers to their jobs after a strike is over. The first, which constitutes the actual holding of the case, is that an employer may *not* distribute poststrike job opportunities on the basis of union activism, and thus may *not* refuse reinstatement to those most active in favor of those less active. 304 U.S. at 346-47. The second, which was *dictum* because not presented by the facts, is that "[it is not] an unfair labor practice to replace . . . . striking employees with others in an effort to carry on the business [or to refuse] . . . to discharge those hired to take the

place of strikers, upon the election of the latter to resume their employment." *Id.* at 345-46.

This Court's later cases make clear that the second *Mackay* rule is only a narrow exception drawn against the first one—*viz.*, the general rule prohibiting interference with or discrimination against employees for exercising the statutory right to strike. Under that rule, an employer who refuses to reinstate economic strikers at the end of the strike commits an unfair labor practice unless he can show that he acted because of "legitimate and substantial business justifications." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967):

> If, after the conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their right to organize and to strike . . . and it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. . . . In some situations, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB v. Mackay Radio & Telegraph Co.* . . . . [389 U.S. at 379].[29]

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[29] That the Court in *Fleetwood* was characterizing the *Mackay* rule as an exception seems readily apparent. Subsequent court of appeals decisions applying *Mackay* have also characterized it as such. *International Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 694, 696 (7th Cir. 1972); *Giddings & Lewis Inc. v. NLRB*, 675 F.2d 926, 930 (7th Cir. 1982) (quoting *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980)); *George Banta Co. v. NLRB*, 686 F.2d 10, 19-20 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

Further, this Court has also recognized that even where there *is* a "legitimate and substantial business justification" for an employer's adverse treatment of strikers as compared to those employees who work during a strike, the detrimental impact on the right to strike can in certain circumstances be so severe as to constitute an unfair labor practice. Thus, in *NLRB v. Erie Resistor Corp.*, *supra*, the court of appeals had held that

> inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted *solely* to protect and continue the business of the employer. [373 U.S. at 226, *quoting* 303 F.2d at 364].

This Court rejected that approach, not because of any doubt that the employer could more easily attract replacements and crossovers by offering preferential seniority treatment, but because the severe impact on the exercise of the right to strike went beyond the more limited effect sanctioned in *Mackay*, and beyond that which could be tolerated under the Act:

> The Court of Appeals and respondent rely upon *Mackay* as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be, as the Court of Appeals said, that "such a replacement policy is obviously discriminatory and may tend to discourage union membership." But *Mackay* did not deal with superseniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement. [373 U.S. at 232].

Thus, this Court's NLRA precedents do *not* sanction *any and all* employer actions taken in order to make it easier to operate during a strike; rather, those precedents prohibit employer actions which go beyond the minimum that is necessary "in an effort to carry on the business."

2. In particular, this Court's NLRA cases in no way sanction two premises that are essential to petitioner's position in this case.

A. First, petitioner assumes that the right to hire permanent replacements is absolute, and that an employer can do so even if he could secure an adequate number of workers during a strike through offers of temporary employment. As the quotations above indicate, however, this Court has consistently explained *Mackay* as a situation in which permanent replacement was offered *in order to continue operation of the business.* Moreover, this Court has also indicated that absent that substantial business justification, permanent replacement would violate the NLRA because the fear of loss of jobs impairs the exercise of the right to strike. *Erie Resistor*, *supra*, 373 U.S. at 232; *see Belknap v. Hale*, 463 U.S. 49 (1983) (Blackmun, J., concurring) ("Promises of permanent employment, and subsequent retention of replacements, are permitted only because it is believed that the harm to protected activities is outweighed *by the employer's interest in operating its plant during a strike*") (emphasis supplied).[30]

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[30] The NLRB has held, as this Court noted in *Belknap v. Hale*, 463 U.S. at 505 n.8, that an employer may hire permanent replacements "at will", and need not demonstrate that the promise of permanence was made in order to continue operations during the strike. *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). The NLRB's basis for so holding, however, was not any expert view of its own; rather, the Labor Board read this Court's cases "as holding that the motive for such replacements is immaterial . . ." *Id.* And, while this Court in *Belknap* in turn noted *Hot Shoppes*, and stated that "[t]here are no cases in this Court that require a different conclusion", the *Belknap* Court did not purport to decide the *Hot Shoppes* question since "[t]hat issue is not posed in this case." 463 U.S. at 505 n.8. In short, the propriety of the NLRB's *Hot Shoppes* doctrine remains an open issue in this Court.

Thus, while the Court has not decided the question, it is far from clear that even under the NLRA, an employer can permanently replace striking employees without showing that it is "reasonably necessary" to do so. And there is certainly no basis for inferring from this Court's silence on this NLRA question that an employer governed by the RLA can, despite the heightened concern of that statute for continuity of the employer-employee relationship (*see* Part II, *supra*), replace strikers permanently although the employer could operate during the strike, and work less damage to the continuity of the workplace community by replacing the striking employees only temporarily.

B. Second, this Court has not yet addressed directly the question whether, under the NLRA, promises of preferential poststrike retention can be made to crossovers as opposed to replacements from outside the bargaining unit, either in general or, in particular, in situations in which seniority principles generally govern the distribution of positions within the active workforce among permanent employees.

Mackay itself did not involve crossovers, *viz.*, *employees from the bargaining unit* who chose to abandon the strike and return to reclaim their jobs. The replacements in *Mackay* were individuals who came from other cities where they had been permanently employed. They were thus outsiders to the prestrike employee compliment who were "*hired*" as replacements, in contrast to the strikers who desired "to resume their employment." The *Mackay* Court therefore referred to the employer's need to give "assurances . . . to those who *accepted employment* during the strike that if they so desired their places might be permanent . . ." 304 U.S. at 345-46 (emphasis added).

Similarly in *Fleetwood*, in articulating the *Mackay* exception as it applied to a refusal to reinstate strikers, the Court used the phrasing ". . . when the jobs which the strikers claim are occupied by workers *hired as permanent replacements* during the strike in order to continue operations." 389 U.S. at 379 (emphasis added). Then, turning to the facts in *Fleetwood*, the Court specifically noted the number of replacements "hired" during the strike but did not even refer to the numerous crossover employees (almost half of the original employee complement) who had chosen not to go out on strike. *Id.*, at 380. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27 (1967) (emphasis supplied), the Court referred to those who worked during the strike as ". . . nonstrikers, persons *hired as replacements for strikers*, and some original strikers who had later abandoned the strike and returned to work." And in *Erie Resistor*, the Court consistently distinguished the term "replacements" from the term "strikers who returned to work" in explaining the rationale leading to its refusal to expand the *Mackay* rule so as to allow an employer's grant of super-seniority to both of these groups. 373 U.S. at 231-32. In fact, in the underlying NLRB decision in *Erie Resistor Corp.*, 132 NLRB 621, 623 (1961), the Board specifically noted:

> Further permitting an employer to grant superseniority to *all* who work during a strike greatly enlarges the definition of "replacement" as envisaged by *Mackay*. Under the Supreme Court's *Mackay* decision, an employer during an economic strike is permitted to secure *new employees, or employees outside the bargaining unit*, to work permanently at unit jobs. But superseniority is normally offered not only to new employees . . . but to the bargaining unit employees themselves, if they abandon the strike, or chose not to join it. [Emphasis added].

Not only has this Court never held that a promise of post-strike preference to crossovers is always valid, but the concerns voiced by this Court in *Erie Resistor* largely revolve around the circumstance that in that case, the employer's policy gave preference to crossovers over full-term strikers:

> A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers. . . . Super-seniority made available to striking bargaining unit employees as

> well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike effort. . . . Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. . . This combination of threat and promise could be expected to undermine the striker's mutual interest and place the entire strike effort in jeopardy. [373 U.S. at 230-31].

The central point of these observations is that a policy that creates an incentive for the members of the striking employee group to *individually* abandon the strike for fear of losing out to other members of the group threatens the right to engage in collective action directly and impermissibly, by creating an incentive for preferring individual over group action.[31] The crossover preference policy in this case created, of course, precisely that incentive, and therefore had a seriously detrimental impact upon the group's ability to engage in collective

[31] It is no answer to the force of this factor to observe that strike replacements also have a protected right to engage in concerted activity. The NLRB has recognized that real distinctions exists between the situation of replacements and crossovers for purposes of assessing their community of interest during concerted strike activity.

For example, an employer is permitted unilaterally to institute employment terms for *replacements* during an economic strike totally different from what the employer had offered the union in negotiations for its bargaining unit employees as an incident of its *Mackay* privilege to hire permanent strike replacements. Indeed, the employer has no statutory duty to bargain over those employment terms for the replacements. *Imperial Outdoor Advertising*, 192 NLRB 1248 (1971); *Leveld Wholesale, Inc.*, 218 NLRB 1344 (1975); *Capitol Husting Co. v. NLRB*, 671 F.2d 237 (7th Cir. 1982). An employer may *not* make such an offer to crossovers. *Capitol-Husting Co. v. NLRB, supra*; *McCormick-Shires Millwork, Inc.*, 286 NLRB No. 68 (1987). Thus, under NLRB law, the community of interest of crossovers lies with the overall pre-strike employee group and not with new-hire third parties attracted from other employment.

action quite different from that worked by hiring outside replacements alone.[32]

Moreover, the other primary reason that *Erie Resistor* found the policy in that case so much more destructive of employee rights and of the NLRA's statutory policies than that in *Mackay* as to constitute a *per se* violation of the NLRA is present to some degree here as well: Like the super-seniority policy in *Erie Resistor*, TWA's policy in this case "creates a cleavage in the plant continuing long after the strike is ended." *Erie Ressitor*, 373 U.S. at 231.

One aspect of TWA's policy is to redistribute jobs internally during the strike so that the early returning strikers were able to obtain, *permanently*, the more desirable jobs for which the seniority of many full-term strikers would have entitled them. The result, for *returned* full-term strikers, is that their pre-strike expectations regarding their job assignments were indefinitely defeated in favor of junior crossovers.[33]

[32] Two court of appeals cases particularly emphasize the importance of the distinction between an employer policy that threatens the strikers as a group, and one that creates an inducement for strikers to defect from the group, thereby undermining the collective nature of the effort that is at the heart of the NLRA. *See George Banta Co. v. NLRB*, 686 F.2d at 19 ("the relevant question is whether the employer has illegally burdened the statutory right to strike by artificially dividing the workforce into those who did not engage in strike activity and those who did . . . . Such division . . . may not be countenanced under the [NLRA] because the claimed business purpose does not outweigh the necessary harm to employee rights"); *International Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 698.

[33] The employer contention that preferential retention of the crossovers at the conclusion of the strike ". . . simply cannot create 'long-term conflict and division within the workforce' because by definition the strikers are not 'in the workforce,'" (TWA Br. 44), is specious reasoning clearly ignoring the reality of the situation. The senior full-term strikers clearly will have reason to bear *sustained* resentment, well beyond the time when they eventually do get reinstated, toward the junior cross-overs who delayed their return

Once again, there is no reason for this Court to reach in this case the question whether, under the NLRA, a policy favoring junior crossovers over senior full-term strikers is sufficiently more destructive of the right to engage in collective activity than a simple *Mackay* policy in favor of new hires as to constitute a *per se* unfair labor practice under *Erie Resistor*. Rather, our point is simply that the NLRA cases at least recognize that there *is* a distinction between the two kinds of policies, and that the distinction is in some cases determinative. For reasons already stated in Part II, *supra*, whatever may be the case under the NLRA, this distinction is one of several reasons for holding TWA's crossover job retention program invalid under the *Railway Labor Act*.[34]

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and caused them to lose substantial amounts of wages and benefits purely by virtue of abandoning the strike early.

We note that there is no indication in *Mackay* that the employer had any seniority or other system in place that generally determined questions of assignment to the active workforce or assignment within that workforce; the likelihood is that there was no such system, because the strike in *Mackay* arose before any collective bargaining agreement had even been signed with the employer. *Mackay Radio & Telegraph Co.*, 1 NLRB 201 (1936). *See* p. 34, *supra* (where a seniority system is in place, resentment of policies that override that system is acute).

[34] There are two other points worth noting.

First, if this Court were to address a reinstatement program similar to the one in this case under the NLRA, the result might well turn on a *combination* of the two issues we have indicated in the text are open under the NLRA. Given the more severe impact of a crossover preference upon collective rights, a more precise showing of a need to provide that preference in order to operate during a strike might be required. We note in this regard that for the same reasons as pertain under the RLA (pp. 37-38, *supra*), there is considerably less basis for *presuming* the necessity of post-strike retention promises for crossovers than for permanent replacements.

Second, in criticizing the rationale and result reached by the Court of Appeals, the NLRB in its amicus brief emphasizes the crossover's rights to reinstatement to "his job" as being based upon "the same entitlement" that a full-term striker has with respect to regaining "his job." Once the crossover has returned to "that

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job," the Board maintains, there is no vacancy "in that position" to which a full-term striker can later lay claim on the basis of his statutory right to be reinstated without discrimination . (NLRB Br. at 13). This approach is problematical at best, quickly breaking down in a factual situation, such as here, where the primary bargaining unit "jobs" or "positions" are so fluid and fungible as to make such a precise determination of whose job is filled and whose is not quite impossible.

Perhaps recognizing this inherent weakness in its main argument, the Board shifts gears somewhat and attacks IFFA's position, validated by the Eighth Circuit in the decision below, that crossovers cannot be granted permanent replacement status so as to give them a preference in reinstatement at the end of the strike. In effect, the Board argues, to treat crossovers only as "temporary replacements" and to grant them such limited reinstatement during the strike would be tantamount to penalizing the crossovers *themselves* for striking or, in the case of those who did not strike at all, for "the fact that *others* engaged in strike activities" which would have been statutorily [im]permissible." (NLRB Br. 14-15).

The Board, however, has approved private strike settlement agreements between unions and employers on a number of occasions which provide for senior full-term strikers "bumping" less senior strike replacements and crossovers. *E.g., Copaz Packing Corp.* (NLRB General Counsel's Advice Memorandum) 115 NLRB 1008 (1983), *George Banta Co.*, 256 NLRB 1197 (1981), enforced 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 10082 (1983). There is therefore, simply no justification for the NLRB in this case to contend that TWA would have been guilty of an unfair labor practice under the NLRA if the Company had refused to grant the crossovers the right to be permanently retained and not displaced at the end of the strike by more senior full-term strikers.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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No. 87-548

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Summary Response

Respondent essentially ignores Petitioner's brief and that of *amicus curiae* National Labor Relations Board—both of which demonstrate that the body of established authority under the National Labor Relations Act ("NLRA"), even if applied to the Railway Labor Act ("RLA"), is contrary to the decision below. Indeed, although Respondent below and the court of appeals (to the extent they relied on any authority) based their arguments and rationale on NLRA decisions, Respondent now takes Petitioner to task for discussing their erroneous interpretation of those decisions. (Resp. Br. 40)[1]

Before this Court, Respondent postulates a Railway Labor Act that does not exist and a "seniority" right never agreed to by the parties, in order to invent promises of "exemptions from neutral seniority rules" (Resp. Br. 37) that were never made, and to hypothesize discrimination among members of the active workforce that did not occur and was not alleged below.[2] In effect, it urges that national labor policy be rewritten to vitiate the free choice of employees not to support a strike, and asks

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1 Respondent's brief on the merits is referred to as "Resp. Br."; Petitioner's brief, as "Pet. Br."; the Appendices to the Petition for Certiorari, as "App. Cert."; the Joint Appendix, as "JA"; and the brief of *amicus curiae* National Labor Relations Board, as "NLRB Br.".

2 Respondent's theory depends on and repeats the arguments it made in *Trans World Airlines* v. *Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), *aff'd by an equally divided Court*, 108 S. Ct. 1101 (1988), *pet. for reh'g pending* ("*TWA I*"). Its principal reliance is on *Brotherhood of Ry. and Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) ("*FEC*"), which was nowhere mentioned by the court of appeals in this case. The court did say that the underpinning of the decision below was its holding in *TWA I* (based on its misreading of *FEC*) that the union security clause survived the expiration of the status quo period. But Respondent now repudiates that stated rationale—saying unequivocally that its brief "proceeds on the premise that the union security clause is indeed *irrelevant*. . . ." (Resp. Br. 4 n.6; emphasis in original) It goes on to say that "the court of appeals' result, and the basic thrust of its reasoning, are nonetheless correct." (*Id.*) Once reliance on the union security clause is removed, however, there is no other reasoning.

the Court to undo major consequences of a hard-fought economic struggle permitted by the RLA—a struggle that IFFA continued for over ten weeks to a failed conclusion.

It has long been the settled rule, based primarily on NLRA authorities, that absent a back-to-work agreement to the contrary, economic strikers are not entitled to reinstatement unless there are *vacancies* in the workforce. (*See* Pet. Br. 18-31; NLRB Br. 7-13.) Nonetheless, the claim is made here that strikers have a right, on the basis of "seniority," to create vacancies by *displacing* active employees. This asserted right, according to IFFA, extends to all jobs held by flight attendants employed before the strike began who exercised their right to work during the strike ("incumbent employees"); it does not extend to jobs held by new-hire replacements, although they have less "seniority" than the strikers and the incumbent employees.

The Union concedes (as it must) that TWA had the "right to continue operations during [the] strike." (Resp. Br. 31) Also accepted, at least for purposes of this case, is TWA's right to hire "outside permanent replacements," *i.e.*, new hires. (Resp. Br. 33 n.23) It follows that under the RLA (as well as the NLRA),

- the threat of job loss due to the use of new-hire replacements—although it may induce individual decisions to abandon collective activity—does not have an impermissibly "coercive impact upon the exercise of the right to strike" (Resp. Br. 6);
- actual job loss—even if it reflects "mass turnover of employees" (Resp. Br. 7) and is the consequence of strike participation—does not impermissibly "burden the right to strike" (Resp. Br. 6); and
- TWA's retention of new hires—"in preference to more senior full-term striking employees" (Resp. Br. 4)—did not constitute "employer retaliation for strike participation" (Resp. Br. 6).

As the district court correctly concluded (App. Cert. 24-25), there is no basis in law or in reason for distinguishing between TWA's refusal to displace new hires in order to create vacancies

for strikers and its retention of incumbent employees. IFFA has repudiated the sole basis on which the Eighth Circuit relied in purporting to create a distinction. (*See* App. Cert. 7 n.4; n.2, *supra*.) Indeed, in the course of a confused attempt to distinguish between new hires and pre-strike employees, IFFA acknowledges that, even under its "approach," "the same basic analysis would apply to outside replacements and to crossovers." (Resp. Br. 39 n.28)

Respondent nonetheless argues that allowing or "inducing" a pre-strike employee to work during a strike, with the understanding that he will remain in the job after the strike is over, is somehow "illegally coercive of the right to strike" (Resp. Br. 40)—although similar treatment of new-hire replacements is not "illegally coercive." Nothing in this Court's decisions, however, or in those of the lower courts, even suggests that the decision of an incumbent employee not to strike, or to abandon a strike, interferes with the right of other employees to strike. Respondent asks this Court to establish a new rule that no incumbent employee can prevent his job from being at risk, because of a strike in which he does not participate, so long as more senior employees choose to remain on strike.

IFFA cites no decision in which any court has reached the result it urges here. Instead, the refrain of its theory is fabricated RLA "stability" or "continuity" concerns (Resp. Br. 7) nowhere expressed in the language or history of the Act or in the decisions interpreting it. Relying on these so-called "stability concerns," IFFA portrays the RLA as a scheme intended

- to "protect" (Resp. Br. 15) rather than to "prevent" strikes (*Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 148 (1969));
- to compel adherence to "*collective* decision" (Resp. Br. 37; emphasis in original) rather than to accommodate a " 'long standing tradition of voluntary unionism' " (*Communications Workers* v. *Beck*, 108 S. Ct. 2641, 2653 (1988)); and
- to "require" as a matter of law a "seniority" right (Resp. Br. 35) that the Union did not achieve through the process of "self-adjustment" the Act was designed

to foster (*Machinists* v. *Street*, 367 U.S. 740, 772 (1961)).

The "stability" required by the RLA, however, is the status quo mandated "*until* all the settlement procedures provided by the RLA have been exhausted," as they were here. *Burlington N. R.R.* v. *Maintenance of Way Employes*, 107 S. Ct. 1841, 1851 (1987) ("*Burlington*") (emphasis added). And, the only "continuity" concern expressed in the Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." (RLA § 151a(1)) The Act is silent as to any "stability" or "continuity" once its stability-oriented processes have failed and a strike has occurred.

There is no dispute that the RLA preserves the right to strike. There should also be no dispute that strikes are not necessarily cost-free. A strike is no mere exercise or game with a return to square one at its end; it is economic warfare, undertaken only at significant risk of change for *all* parties. The RLA does not guarantee that a strike will be effective; it contains no assurance that a striker's job will be there when the union decides to call off the strike; and, if an ill-conceived strike fails, the RLA does not (as IFFA contends) entitle the union, upon demand, "to return matters to what they would have been . . . had there been no strike." (Resp. Br. 34)

The thrust of Respondent's brief seems to be a reargument of its contentions in *TWA I*, coupled with reliance on emotionally-charged concepts, which have no application here.[3] What *FEC* means for the construction of the RLA has been fully developed in the briefs in *TWA I*, and this reply brief is not the place to restate that simply because Respondent chooses for the first time to make *FEC* the major focus of its argument, having repudiated as "irrelevant" the rationale of the court below. Since Respondent has now made *FEC* central to its argument,

3 Because the equally divided affirmance in No. 86-1650 left unresolved the limitations of *FEC*, Respondent is free here to rely on the Eighth Circuit's misreading of *FEC* (in *TWA I*) and to premise its entire argument on the contention that postulated pre-strike conditions are continued "by virtue of the statute" (Resp. Br. 33), regardless of the terms of the contract. IFFA's reliance on *FEC* in this case only highlights the need for guidance from the Court concerning the proper application of that decision.

however, it becomes even more imperative that rehearing in *TWA I* be granted and that both cases be considered together on the full briefings in each. The remainder of this brief will reply to Respondent's contentions about the reemployment rights of strikers—the issue in *this* case—with only summary reference to Respondent's misuse of *FEC*.

The Question Before The Court

No mere repetition of inapplicable concepts like "post-strike preference," "employer retaliation" and "coercive employer action" will make them true or relevant. And, "[p]utting the wrong questions is not likely to beget right answers even in law."[4] It is, therefore, worth restating the question that *is* before the Court—which is correctly answered in the brief of *amicus curiae* National Labor Relations Board:

> The suggestion that refusing to displace junior crossover employees with returning full-term strikers discriminates on the basis of union activity is unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill. (NLRB Br. 6)[5]

Nothing in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) ("*Mackay Radio*"), or any other decision of

4 *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring).

5 The Union ignores the absence of vacancies and contends—but only when its purposes are served by doing so (*cf.* pp. 7-8, *infra*)—that flight attendant jobs "are so fluid and fungible as to make . . . a precise determination of whose job is filled and whose is not quite impossible." (Resp. Br. 49 n.34) If flight attendant jobs are "fungible," all flight attendants in the active workforce must be viewed as an undifferentiated group, filling indistinguishable jobs, and the new hires *not* previously in the workforce can only have replaced the strikers on the rehire list; they cannot be *replacing* the "crossovers" with whom they have been working since before the end of the strike. *See, e.g., Laidlaw Corp.*, 171 N.L.R.B. 1366, 1385 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

this Court, suggests any limitation on the employer's right to refuse to discharge those who worked during an economic strike "in order to create places for [strikers]." The retention of those who worked—*in and of itself*—is a " 'legitimate and substantial [business] justification' " for refusing to reinstate strikers. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).[6] That

6 IFFA points to no decision that has even inquired into whether an employer "attempt[ed] . . . to operate" without making assurances of permanence (Resp. Br. 39) or whether it was "necessary" for the employer to make such assurances in order "to continue operations during [an economic] strike" (Resp. Br. 40)—let alone required such a showing. This is so because "*Mackay* eliminates the need for any case-by-case application of the [business need] test to justify the hiring of permanent replacement workers. . . ." *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 929 (7th Cir. 1982). Leaving aside the impracticability of attempting first to operate with temporary employees (and the losses attendant upon failure), and the chilling effect of review by hindsight dependent " 'upon judicial views of social and economic policy' " (*Burlington*, 107 S. Ct. at 1850), if any "need" test is to be established, it is for Congress, not the courts. *See* Pet. Br. 21-22 n.18; *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

Neither *Mackay Radio* nor its progeny, moreover, suggest a need to inquire whether employees who worked during a strike were "giving up their regular employment." (Resp. Br. 38) To the contrary, the "replacements" in *Mackay Radio* were already employees of the company (or its parent) "transferred from employment" at other places, after they chose not to join the strike, to a location where their services were needed. *See* 1 N.L.R.B. 201, 206, 216 (1936); 304 U.S. at 337. All were free to return to their previous positions and some, in fact, did so. 304 U.S. at 338-39. Plainly then, there was "no need to offer permanence in order to induce [them] to give up a *different*, permanent job." (Resp. Br. 38; emphasis in original). *See also, e.g., H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357, 362 (2d Cir. 1972).

Respondent contends that "a permanent replacement policy, standing alone, does not encourage *individual* decisions to split off from the group . . ." and return to work. (Resp. Br. 37; emphasis in original) On the very next page, however, IFFA points out that this Court has recognized as among the reasons why an *individual* employee may decide to abandon a strike the fact that "the ease with which the employer replaces the strikers may make the strike seem less provident." *NLRB* v. *Granite State Joint Bd.*, 409 U.S. 213, 217 (1972). *See also, e.g., Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1244 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

Although not disputing that individual flight attendants had a *right* to refrain from striking (even under Respondent's theory), IFFA speaks of

principle applies equally to new-hire replacements and pre-strike employees. There is no rational basis for concluding that pre-strike employees had *lesser* rights to retain their jobs at the end of the strike than did new-hire replacements. (*See* App. Cert. 24-25; Pet. Br. 26-31; NLRB Br. 6-7, 12-16.)

The Court's ruling in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) ("*Erie Resistor*") did not "largely revolve around the circumstance that in that case, the employer's policy gave preference to crossovers over full-term strikers . . . ." (Resp. Br. 45) *Erie Resistor* involved the award of twenty years "super-seniority" for layoff purposes to new hires and crossovers—thereby ensuring that, in the event of future reductions in the active workforce, reinstated full-term strikers would be laid off first. Nothing of the sort happened here: incumbent employees had only the right to the jobs they filled—no more, no less. (*See* Pet. Br. 41-48.)

IFFA's allegations concerning the supposed effects of the retention of incumbent employees on "*returned* full-term strikers" (Resp. Br. 47; emphasis in original) are a belated attempt to turn this into a different case by asserting a cause of action not stated in its complaint (App. Cert. 47-56) and not presented to the courts below. (*See* Resp. Br. 2: IFFA's claim was that TWA denied "reinstatement" to over 2,000 of the full-term striking employees.) Now, however, in a transparently flawed attempt to portray this case as involving the concerns voiced in *Erie Resistor*, IFFA speculates that, after the strike, early returning strikers were "cement[ed] . . . into more desirable jobs" (presumed to be in the California domiciles) and that "[t]he result, for *returned* full-term strikers, is that their pre-strike expectations regarding their job assignments were indefi-

"*individual* decisions to split off from the group" (Resp. Br. 37; emphasis in original) as if they were anathema to the RLA. To the contrary, the RLA expressly protects the right of employees "*not* to join or remain members of any labor organization. . . ." 45 U.S.C. § 152 Fourth (emphasis added). Indeed, it is so commonplace in industrial disputes that some employees choose, *for reasons best known to them*, not to participate in a strike, that union constitutions provide for that eventuality. This Court's decisions in *Granite State, supra*, and *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985), protect employee freedom to make that choice.

nitely defeated in favor of junior crossovers." (Resp. Br. 12, 47; emphasis in original)[7]

If full-term strikers domiciled in California before the strike were reinstated to "other jobs," it was because their pre-strike jobs had been filled—either by a new hire, an earlier returning striker or a full-term striker already reinstated. And, if a reinstated striker has not yet been able to transfer to a California domicile, it is not due to any "preference" awarded by TWA, but because application of the pre-strike seniority rules—which IFFA insists must be maintained—has not resulted in a transfer. (*See* pp. 13-15, *infra*.) In short, IFFA's assertion that the "pre-strike expectations" of "*returned* full-term strikers" have been "defeated" (Resp. Br. 47) is but another way of complaining that TWA filled "places left vacant by strikers." *Mackay Radio*, 304 U.S. at 345.

Similarly, the "promises" of which IFFA complains (Resp. Br. 37) were simply statements by TWA to the effect that it would not enter into a back-to-work agreement under which working flight attendants (whether new hires or pre-strike employees) would be displaced to make room for strikers—a position that TWA had the right to take and maintain. If any "competition" was created for post-strike jobs (Resp. Br. 12), it resulted from TWA's exercise of its undisputed right to employ permanent replacements. If "expectations" were

7 Before the district court, Respondent said: "It is nonsense to contend that a person holding a cabin attendant slot in the Los Angeles domicile holds a . . . 'position' *different* from a cabin attendant slot held by a person at the JFK domicile in New York." (IFFA's Supplemental Suggestions, at 9; emphasis in original)

In any event, as the parties stipulated, at the end of the strike, 383 of the jobs in the California domiciles were filled by permanent replacements hired during the first few days of the strike alone, 1036 (or over 80%) of the 1284 early returning strikers were domiciled in New York or St. Louis, and only 220 (or about 17%) were domiciled in California. (App. Cert. 60, 61 ¶¶ 20, 26) As IFFA well knows, moreover, since the strike ended, 200 full-term strikers have obtained jobs at the Los Angeles domicile. As IFFA also knows, because so few active flight attendants (be they new hires, "crossovers" or full-term strikers) have bid for the "more desired" (Resp. Br. 13) service manager openings, TWA has had to "draft" the *least senior* cabin attendants (*i.e.*, new hires) to fill those openings. This procedure was provided for in the 1981-84 agreement. (JA 78)

denied (Resp. Br. 35), they were expectations created by IFFA through its puffery about back-to-work agreements.[8] The only "retaliation" (Resp. Br. 19) is IFFA's effort to displace incumbent employees in order to make places for strikers whom it views as having shown more "fealty" (Resp. Br. 34) to the Union. And the only "poststrike preference" (Resp. Br. 8) in question is that which IFFA seeks for full-term strikers over less senior employees who abandoned or refused to join the strike—a "preference" that the Union had the right to *attempt* to negotiate but did not achieve, either in the expired 1981-84 agreement, or in a back-to-work agreement.[9]

8 IFFA literature (to those it referred to as "strikebreakers" and "scabs") emphasized that it had the "right to *negotiate* a 'BACK-TO-WORK AGREEMENT' which ensures the return of all our members to the job" and that "all prior strikes at TWA [had] resulted in such a back to work agreement." (Exhibit H-2 to Henderson Affidavit, dated August 6, 1986, reproduced at 249-50 of Joint Appendix before the Eighth Circuit; emphasis added) The real gravamen of IFFA's complaint is its inability, due to a lack of economic strength, to obtain that back-to-work agreement. It is that inability that the Union asks this Court to cure, as if the heart of the Act were the judicial imposition of back-to-work agreements rather than a machinery to promote the self-adjustment of disputes.

IFFA makes much of the supposed "expectations" of the strikers, " 'reinforced by a sense of rightness of the basic principle of length of service.' " (Resp. Br. 35) It says nothing about whether there is any "sense of rightness" associated with requiring incumbent employees—who endured abuse, threats and intimidation in the belief that they were preserving their jobs—to give up those jobs to the very employees who had called them "scabs." (JA 105-06, 107-08, 154)

9 Typical of IFFA's attempt to obscure the economic realities that determine the outcome (and consequences) of a strike is its assertion that TWA's so-called "crossover policy" (which was nothing but a willingness to let incumbents keep their jobs) led to "the demise of the strike." (Resp. Br. 13) It ignores that (i) the "overwhelming" vote to strike (Resp. Br. 11 n.8) took place over nine months before the strike began (*IFFA* v. *TWA*, 682 F. Supp. 1003, 1008 (W.D. Mo. 1988), *appeal pending*), without any opportunity for flight attendants to vote on TWA's final offer; (ii) TWA was able to hire 2800 new permanent employees—at wages significantly below those offered to pre-strike flight attendants (*id.* at 1012-13 n.6, 1017); (iii) the TWA pilots and mechanics either would not (or could not) strike in support of IFFA's demands (*see TWA* v. *Machinists*, 629 F.Supp. 1554, 1558 (W.D.

In short, TWA's conduct was fully consistent with decades of authority under the NLRA. The only real question, therefore, is whether something in the RLA required TWA to grant to full-term strikers a "preference in employment," over less senior employees who worked during the strike, by removing the incumbents from the jobs they held and giving them to strikers.

The Fabricated "Stability Concerns"

Respondent posits three "stability" or "continuity" concerns as "envision[ed]" by the Railway Labor Act. All are fabrications derived exclusively from inapposite *dicta* in *FEC*. Not one is implicated by the question before the Court.

FEC has no bearing on this case; it was not even mentioned in the decision below. *FEC* did not involve, and the Court did not address, any right of strikers to reinstatement. Emphasizing that carriers have a duty to make "reasonable efforts to maintain the public service at all times" (384 U.S. at 245), the Court upheld the authority of the federal courts to permit a carrier to depart from the terms of an *existing agreement* to the extent "reasonably necessary" to operate during a strike. This case, however, presents no departure from any agreement, existing or expired. (*See* pp. 13-16, *infra*.)[10]

Ignoring the real Congressional objective of *preventing* strikes, the Union hypothesizes "continuity principles"

Mo. 1986)); (iv) when IFFA called off the strike, TWA had demonstrated its ability to operate for over ten weeks and was about to enter its peak season with nearly a full complement of flight attendants (JA 110); and (v) despite the ten-week strike and a national boycott effort, IFFA was unable to achieve an agreement on its terms.

10 Justice Douglas's comments, moreover, about the "community of striking employees and the carrier" and the "continuity of [that] relation" (Resp. Br. 26, 23) were not addressed to the respective rights of striking employees *vis-a-vis* one another, or to those of strikers and more recent additions to the "community" (*i.e.*, new-hire replacements). Even the particular pre-strike "community" of which he spoke did not experience "continuity" and was, in fact, "destroyed by the strike." 384 U.S. at 246-47. *See UTU* v. *Florida East Coast Ry.*, 586 F.2d 520, 522-23 (5th Cir. 1978).

designed not just to tolerate strikes when the lengthy major dispute procedures (and the concomitant status quo) have been exhausted, but to *protect* strikes (Resp. Br. 15)—as if the goal of Congress had been to increase the likelihood that strikes would be effective, by insulating employees from the consequences of striking and by perpetuating the "effective" representative status of incumbent unions, no matter how ill-advised the strikes they call. The Union cites no decision in the more than sixty years since the RLA was enacted even articulating its three "stability concerns,"[11] let alone applying them to require the reinstatement of economic strikers:

(1) This Court did not hold in *FEC*, or any other case, that "the RLA *itself* preserves the contractually-established pre-strike working relationships . . . ." (Resp. Br. 34; emphasis in original) To the contrary, *FEC* announced a special rule allowing *interruption* of the "continuity" established by contracts that, according to their terms, would otherwise have been in effect.

(2) Any RLA concern with the "continuity of employer-employee relationships" (Resp. Br. 30) focuses on the need to

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11 Contrary to Respondent's assertion that *FEC* interprets the RLA as requiring the *post*-strike "stability" IFFA favors, the only sense in which it is true that the purpose of Congress in enacting the RLA was to provide a machinery that would lead to "stability" is that, consonant with RLA § 151a(1), the principal objective of the Act is "to encourage collective bargaining by [carriers] and their employees *in order to prevent*, if possible, *wasteful strikes* and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 148 (1969) (emphasis added; footnote omitted). During the process of "virtually endless 'negotiation, mediation, voluntary arbitration, and conciliation' " (*Burlington*, 107 S. Ct. at 1850), "stability"—in the form of status quo conditions—is mandated by the Act. The statements drawn by IFFA from the legislative history of the 1936 amendments to the RLA (Resp. Br. 23-24), when read in context, make precisely this point. *Hearings Before the Senate Committee on Interstate Commerce on S. 2496*, 74th Cong., 1st Sess. at 26-27 (1935). If the processes of the Act fail to produce agreement, however, the parties "may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA." *Burlington*, 107 S. Ct. at 1851. Thus, the Act permits (if all else fails) and contemplates (if no Emergency Board is convened) the instability and discontinuity that result from the use of self-help.

maintain stability *while the dispute resolution procedures of the RLA are operating*. During such periods, injunctive relief is available to enforce the status quo.[12] When the procedures of the Act have been exhausted, however, a test of economic strength—including a break in the continuity of the employer-employee relationship through a strike—is the permitted means for resolving the parties' differences. IFFA cites no authority (and there is none) for the proposition that the continuity of the pre-strike "employer-employee relationship," once broken by a strike, must be resumed by displacing working members of the "community" in order to accommodate others.

(3) The third "continuity" posited by IFFA—continuation of the effective bargaining relationship between itself and TWA—seems designed to perpetuate the strength of a particular representative, without regard to the effect on employee freedom of choice clearly embodied in the Act (*see* RLA §§ 1a; 2 Third, Fourth and Ninth), and is derived solely from out-of-context quotation. Justice Frankfurter's dissent in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 753 (1945) (Resp. Br. 23)—speaking of a "process of permanent conference and negotiation"—is addressed to minor disputes and the Railroad Adjustment Board. His statements made plain, moreover, that the Act's overriding theme of self-adjustment was meant to restrict judicial interference in disputes except in extraordinary circumstances. 325 U.S. at 752. IFFA attempts to depart from the RLA principle of self-adjustment, by seeking judicial imposition of a back-to-work agreement it could not negotiate.

Finally, even if there were support for IFFA's "stability concerns," none of them is implicated here. TWA did maintain the pre-strike seniority rules in effect (*see* pp.13-16, *infra*); the

12 IFFA cites three cases for the proposition that " 'the Railway Labor Act is more concerned [than the NLRA] with continuance of the employer-employee relationship.' " (Resp. Br. 27-28) Not one addresses the employer-employee relationship *during the self-help period*. Two, however, establish that—even while the status quo obligations of the Act apply—an employer may permanently replace strikers. *See National Airlines* v. *Machinists*, 416 F.2d 998, 1007 (5th Cir. 1969); *Empresa Ecuatoriana De Aviacion* v. *District Lodge 100*, 690 F.2d 838, 846 (11th Cir. 1982).

displacement of one group of pre-strike employees (who are, after all, a part of the "community" of which IFFA so repetitiously speaks) in favor of another, does not prevent disruption of the employer-employee relationship;[13] and IFFA remains the certified representative of the flight attendants (both working and unreinstated), with no diminution of the capacity of employees to engage in collective bargaining. Undoubtedly, there has been a diminution of the Union's economic strength, but that is the natural consequence of a failed strike.

The So-Called "Rearrangement" Of The Seniority System

The *sine qua non* of Respondent's theory is its assertion that TWA "fundamentally rearranged [the pre-strike seniority] system, and the expectations of the employees inherent in the system" (Resp. Br. 5) when it refused to displace incumbent employees in order to reinstate strikers. In fact, however, TWA did maintain the pre-strike seniority rules during and after the strike, as IFFA tacitly acknowledges in its brief. (Resp. Br. 33) That some strikers on the preferential rehire list had more seniority than some incumbent employees (and more seniority than *all* new-hire replacements) was not the result of changed rules; it

13 IFFA never even attempts to explain how the mass turnover of hundreds of working flight attendants it advocates would *avoid* further disruption of the employer-employee relationship. Also pointedly ignored is that, if 1200 pre-strike flight attendants had not worked during the strike, either (or a combination) of two consequences would have followed: (i) TWA would have hired more replacements, which would have resulted in greater turnover of employees; and/or (ii) the operation of the airline would have been diminished, which even IFFA concedes is not preferred by the Act.

The "continuity" of TWA's relationship with the full-term strikers, moreover, has *not* been terminated. They were put on a preferential rehire list—from which over 2,500 have been offered reemployment; they continue to accrue seniority; and the National Mediation Board has ruled (albeit over an unprecedented dissent) that no representation election will be scheduled without a majority showing of interest among the working flight attendants *and* unreinstated strikers. *Trans World Airlines (Application of Prof'l Cabin Crew Ass'n)*, 15 N.M.B. No. 6 (1987). *See also Professional Cabin Crew Ass'n* v. *NMB*, No. 87-3346, slip op. (D.D.C. May 27, 1988), *appeal pending*.

was due to the choice of those employees to strike while others chose not to, and to the absence of vacancies, or any agreed-upon right to create vacancies, when the strike ended.

The Union concedes that, even if the 1981-84 agreement remained in effect, strikers had no contract right to displace incumbent employees on the basis of seniority. (Resp. Br. 34) Nonetheless, from the specific, collectively bargained uses of seniority that were provided for in the contract, the Union posits its "general seniority principles" (Resp. Br. 35) designed to bootstrap unreinstated strikers into the active workforce, despite the absence of vacancies, through a use of seniority *not* authorized by the contract. This maneuver is accomplished, IFFA says disingenuously, "[b]y a parity of reasoning" to *FEC*. (Resp. Br. 35)

Even as misconstrued by IFFA, however, *FEC* does not require more than the continuation of working conditions "embodied in agreements." 45 U.S.C. § 152 Seventh. It cannot be read as creating a *statutory* seniority right not provided for in the contract. As this Court has recognized, the uses of seniority are a matter of *agreement*. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949). Nothing in the RLA provides otherwise. "Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." *Colbert* v. *BRT*, 206 F.2d 9, 13 (9th Cir. 1953), *cert. denied*, 346 U.S. 931 (1954).[14]

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14 *Accord*, *McMullans* v. *Kansas, O. & G. Ry.*, 229 F.2d 50, 53-54 (10th Cir. 1956); *Starke* v. *New York, Chicago & St. Louis R.R.*, 180 F.2d 569, 571 (7th Cir. 1950); *Elder* v. *New York Central R.R.*, 152 F.2d 361, 364-65 (6th Cir. 1945); *System Fed'n No. 59* v. *Louisiana & A. Ry.*, 119 F.2d 509, 514-16 (5th Cir.), *cert. denied*, 314 U.S. 656 (1941).

Reading the Railway Labor Act to *require* a particular use of seniority not agreed to by the parties would be fundamentally inconsistent with the "strong federal policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570, 579 n.11 (1971). The RLA simply " 'does not undertake governmental regulation of wages, hours or working conditions.' " *Locomotive Engineers* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 289 (1963).

The two cases cited by IFFA (Resp. Br. 13 n.12, 35 n.25, 37-38 n.26) dealt with a statute that *specifically* provided a right of seniority-based reinstatement and are, therefore, inapposite. And the Union's assertions concerning the virtues of seniority (Resp. Br. 13 n.12, 33-35), even if they were relevant, would apply more to new-hire replacements than to "crossovers" with years of pre-strike seniority.

An agreement to apply seniority "in the complicated bidding system" that determines each month, within a particular domicile, which active flight attendants will be scheduled on which flights (Resp. Br. 10), or to distribute work assignments "to and among the *active* workforce" on the basis of seniority (Resp. Br. 5; emphasis added), does not entitle *inactive* employees to claim the jobs of active employees. A contract right of recall from furlough, on the basis of seniority, to a "vacancy" in the workforce (Resp. Br. 10) cannot be transformed into a striker's statutory right to *create* a vacancy.[15] Nor do contract provisions limited to employees returning from an authorized leave of absence (*e.g.*, a medical leave, or a personal leave granted "[w]hen the requirements of the service will permit . . ." (Stipulations, Ex. 1, 91) constitute an agreement with respect to the reinstatement of strikers. As the district court concluded, in a finding not disturbed by the Eighth Circuit, the 1981-84 agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22)

Contract rights are the result of compromise. If IFFA desired for its membership a seniority right to return from a strike, it should have bargained—and given a *quid pro quo*—for that right. It is no answer to say that strikes are "not generally cov-

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15 The 1981-84 agreement well illustrates the particularity and variations in the use of seniority that are reached through collective bargaining. IFFA says, for example, that even when there *are* vacancies, furloughed flight attendants " 'have recall rights not to domicile but to classification only.' " (Resp. Br. 9) *See also* Article 15(E) (allowing flight attendants returning from a medical leave to "displace" the least senior employee at a particular "location") (Stipulations, Ex. 1, 92); and Article 12(G) (providing a right of recall from furlough only to a "vacancy") (JA 35).

Plainly, when the parties intended to authorize a right of displacement, they said so. And no matter how "fluid" the "employment situation" (Resp. Br. 9), flight attendants were not entitled to leave and reenter the active workforce, to the domicile or classification of their choice, at will. As to the reasons why particular uses of seniority were (or were not) agreed to by the parties (Resp. Br. 13 n.12), the record is silent.

ered in terms by [collective] agreements." (Resp. Br. 34)[16] As the brief of *amicus curiae* Airline Industrial Relations Conference notes (at 20 n.7), the uses to which seniority may be put by unreinstated strikers are commonly addressed in back-to-work agreements negotiated as part of strike settlements.

The Distortion Of RLA § 2 Fourth

It is clear from the statutory language and the legislative history, as well as judicial decisions, that RLA § 2 Fourth does not prohibit all "coercive employer action burdening the right to strike." (Resp. Br. 19) The portion of § 2 Fourth that IFFA uses to forge this all-encompassing and "explicit protection" of strikes (Resp. Br. 7) is designed to ensure "the right of . . . employees to join, organize, or assist in organizing the labor organization of their choice" (45 U.S.C. § 152 Fourth) and is in fact a narrow directive making it unlawful for a carrier "to influence or coerce employees *in an effort to induce them to join or remain or not to join or remain members of any labor organization*. . . ." (emphasis added)[17]

If there were any doubt as to the meaning of that unambiguous language, the legislative history confirms that the purpose of Congress in enacting § 2 Fourth was to effectuate employee freedom of choice of representatives by prohibiting carrier interference with the formation of unions, and to ensure the independence of labor organizations by eliminating the "com-

16 In *TWA I*, the thrust of Respondent's argument was that TWA should have tried to negotiate strike conditions as part of the collective agreement. Indeed, the *amici* in support of its position argued that the "practice is common in the railroad industry . . . ." (Brief of AFL-CIO and RLEA, at 17)

17 Almost immediately, IFFA says that language "necessarily" includes "protection from employer retaliation for *strike participation*." (Resp. Br. 6; emphasis added) Later, it becomes a broad proscription of all "adverse employer actions affecting employees' job rights" (Resp. Br. 17 n.14) and then of all "coercive employer action burdening the right to strike" (Resp. Br. 19). These not-so-subtle changes in formulation are apparently intended as a substitute for the language and judicial interpretation of § 2 Fourth.

pany union," *i.e.*, unions controlled or dominated by carriers.[18] Accordingly, the courts have interpreted § 2 Fourth as limited to pre-certification interference with the formation of unions, or egregious anti-union conduct imperiling the very existence of the union as bargaining representative. *See, e.g., Independent Union of Flight Attendants* v. *Pan American World Airways*, 620 F. Supp. 447, 455-56 (S.D.N.Y. 1985), *aff'd*, 789 F.2d 139, 141 n.2 (2d Cir. 1986); *Machinists* v. *Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982); *see also* brief of *amicus curiae* Airline Industrial Relations Conference at 8-21.

In support of its theory concerning the scope of § 2 Fourth, IFFA characterizes it as "closely analogous" to NLRA § 8(a)(3) and asserts that, when Congress enacted § 2 Fourth in 1934, it "had in mind essentially the same concept of what it means to protect union membership as the concept embodied in the NLRA just one year later." (Resp. Br. 17, 18) When this Court in *Communications Workers* v. *Beck*, 108 S. Ct. 2641, 2654 (1988), interpreted NLRA § 8(a)(3) in part by relying on its interpretation of the later-enacted RLA § 2 Eleventh, it did so based on repeated statements in the legislative history that Congress intended § 2 Eleventh "to confer on railway unions precisely the same right to negotiate and enter into union security agreements that all unions subject to the NLRA enjoyed." IFFA offers no such Congressional statements in the history of the Wagner Act concerning NLRA §§ 2(3), 7, 8(a)(3) or 13.

It is no answer to claim, as IFFA does, that "exercise of the right to strike had, by the time of the 1934 RLA amendments, long been recognized as perhaps the central reason for organiz-

18 *See, e.g.*, H.R. Rep. No. 1944, 73d Cong., 2d Sess. at 2 (1934) ("A considerable number of railway managements maintain company unions . . . a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect."); S. Rep. No. 1065, 73d Cong., 2d Sess. at 2 (1934) (emphasis added) (This bill "prohibits the railroads from interfering in any manner whatsoever with employees *joining or refusing to join* any organization or union . . . . This prohibition is not new. . . . But there are no penalties against its violation. This bill provides severe penalties for violation of the law."); *see also BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385 n.20 (1969).

ing unions in the first place, and a necessary concomitant of union membership. . . ." (Resp. Br. 18) Certainly that would have been no less true when Congress enacted the NLRA in 1935. And it would very likely astonish the 1934 Congress to hear that, by amending the RLA to protect employee free choice of unions (thereby assuring that the Act could work to *avoid* disruption to commerce), they were in fact *promoting* strikes because that is "one of the very actions it is the purpose of unions to promote." (Resp. Br. 19) In any event, IFFA's reasoning was soundly rejected in *Burlington*, where the Court refused to imply a prohibition on self-help on the theory that "the drafters of the RLA did not need to insert an express prohibition of secondary picketing because in 1926 federal law clearly prohibited such picketing." 107 S. Ct. at 1851.[19]

If it were true, however, that RLA § 2 Fourth was intended to be the analogue of the later-enacted NLRA §§ 2(3), 7, 8(a)(3) and 13, then this Court's decision in *Mackay Radio*, and its progeny, should compel the conclusion that TWA's retention of employees who worked during the strike did not violate the Act. As the authorities cited in Petitioner's main brief and in

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19 There is in any event no indication that, when the RLA was enacted, replaced strikers remained employees with a right to reinstatement. *Michaelson* v. *United States*, 266 U.S. 42, 69 (1924) (Resp. Br. 19 n.16) did not reach the question. Respondent's brief reads as if the "right to strike"—regardless of the economic outcome of its exercise—insulates strikers from all detriment. The retention of nonstrikers is not something that TWA must justify by pointing to some "*implied* privilege" in the RLA (Resp. Br. 6; emphasis in original) but a long accepted right of employers in response to a union's exercise of self-help. Prior to 1926, strikes in the railroad and other industries were often met by the hiring of replacements and the use of employees willing to work; they were settled, if at all, by back-to-work agreements. *See, e.g., Birmingham Trust & Savings Co.* v. *Atlanta, B.& A. Ry.*, 271 F. 743 (N.D. Ga. 1921); *Union Pac. R.R.* v. *Ruef*, 120 F. 102, 113, 114 (D. Neb. 1902); II J. Commons, *History of Labour in the United States* 349-50 (1918); III J. Commons, *History of Labor in the United States* 117-28, 453-56 (1932). The "right to strike" was not conferred by the RLA; it was *deferred*. Nothing in the RLA insulates strikers from the potential consequences of exercising that right, or deprives TWA of its right to retain in its service employees who worked during the strike. *See, e.g., FEIA* v. *Eastern Air Lines*, 208 F. Supp. 182, 194 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *see also* Pet. Br. 26-31.

the *amicus curiae* brief of the NLRB establish, "refusing to displace permanent employees [whether new hires or early returning strikers] . . . is not inherently destructive of [employee] rights." (NLRB Br. 12)

CONCLUSION

This Court granted certiorari to decide whether the Railway Labor Act requires that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority." The answer to that question is plainly no. Respondent's attempt to change the answer by changing the question is of no avail, for—even under its formulation—neither the RLA, *FEC* nor the expired agreement gives strikers the right to create vacancies, or requires that incumbents be treated as temporary employees, in order not to "burden the right to strike." The decision below should therefore be reversed.

Respectfully submitted,

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OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC., PETITIONER

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Railway Labor Act, 45 U.S.C. 151 *et seq.*, requires an air carrier to displace non-striking employees and employees who returned to work prior to the end of an economic strike in order to reinstate full-term strikers with greater seniority, where there is no back-to-work agreement and where no provision of the collective bargaining agreement authorizes the exercise of seniority rights to obtain reinstatement after a strike.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-548

TRANS WORLD AIRLINES, INC., PETITIONER

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) administers the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. III) 151 *et seq.*, and has primary responsibility for defining the rights of striking employees covered under that statute. While this case arises under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and the NLRA has "no direct application" to the RLA (*Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969)), the court below applied principles developed under the NLRA in deciding that an RLA employer must displace non-striking employees and employees who returned to work prior to the end of an economic strike in order to reinstate full-term strikers with greater seniority. The case is therefore of significant interest to the NLRB.

STATEMENT

1. On March 7, 1986, respondent union, the Independent Federation of Flight Attendants (IFFA), commenced a strike against petitioner, Trans World Airlines, Inc. (TWA), over the terms and conditions of a new contract for flight attendants (Pet. App. 2a). Petitioner decided to continue operating during the strike (*ibid.*). It therefore hired approximately 1,270 new flight attendants and told them that they would be permanent employees of the airline (*ibid.*). It also continued to employ approximately 1,280 "cross-over" flight attendants—*i.e.*, flight attendants who did not strike or who resumed work during the strike—and, during the course of the strike, hired an additional 1,100 permanent flight attendants (*id.* at 2a-3a, 59a-60a). Finally, it began training an additional group of 463 employees—called "trainees"—to be flight attendants (*id.* at 3a, 59a-60a).

On May 17, 1986, respondent union made an unconditional offer to return to work on behalf of the approximately 5,000 striking flight attendants (Pet. App. 3a). Petitioner, however, decided to retain its new hires, cross-over employees, and trainees (*ibid.*). Therefore, while it agreed to reinstate about 200 of the striking flight attendants in order of their seniority, it placed the remainder on a preferential hiring list (*id.* at 3a, 51a, 53a). Respondent union thereupon filed this action in federal district court, alleging that petitioner's conduct violated the RLA and requesting, inter alia, that the court declare that the striking flight attendants, as economic strikers, were entitled to reinstatement over the employees hired during the strike, the cross-over employees who had less seniority than the striking employees, and the trainees (*id.* at 3a, 19a).[1]

[1] In a separate suit, respondent union also argued that the striking employees were unfair labor practice strikers and entitled to reinstatement on that basis (Pet. App. 5a n.3). On March 9, 1988, the district court rejected that contention, holding that the strike was an economic strike. *IFFA* v. *TWA*, 127 L.R.R.M. 3266 (W.D. Mo.).

2. On the parties' cross-motions for summary judgment, the district court held that the striking flight attendants were entitled to displace the trainees but not the newly hired or cross-over employees (Pet. App. 18a-36a). The court determined that the collective bargaining agreement between petitioner and respondent did not give the striking flight attendants a right to exercise their seniority rights to obtain reinstatement at the end of the strike at the expense of cross-over employees (*id.* at 22a); and that labor law principles concerning the rights of strikers developed under the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. III) 151 *et seq.*, would not confer such a right (Pet. App. 22a-25a); and it rejected respondent's contention that the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, accords greater protection to economic strikers than does the NLRA (Pet. App. 25a). As to the new hires, the court found that they were permanent strike replacements, rather than additions to an expanding workforce, and, accordingly, that, under *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), petitioner was entitled to refuse to displace them in favor of the returning strikers (Pet. App. 26a-29a). Finally, as to the trainees, the court found that they had not assumed flight attendant positions by the end of the strike and, accordingly, that they were not permanent replacements within the meaning of the decision in *Mackay Radio* and could be displaced (*id.* at 29a-35a).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-15a). It initially noted (*id.* at 4a-5a) that, under the NLRA, "[e]mployees who are not working because of a labor dispute remain 'employees' of the em-

ployer unless they obtain other work." It further noted (*id.* at 5a (footnote omitted)) that, under the NLRA, "[w]hen the labor dispute is economic in nature, * * * the employer may hire permanent replacements for strikers in order to continue business operations" and "economic strikers are entitled to reinstatement only as vacancies occur." It then held (*id.* at 5a-14a) that only the new hires, and not the trainees or the junior cross-overs, could be treated as permanent replacements for the strikers.

As to the cross-over employees, the court noted (Pet. App. 7a) that, in an earlier case, *TWA* v. *IFFA*, 809 F.2d 483 (1987) (*TWA I*), it had held that the union security provision of a prior contract between petitioner and respondent continued in effect and that, as a consequence, "all cross-overs must retain their union membership."[2] It added (Pet. App. 7a) that "[petitioner] may not discriminate among union members based on the degree of their union activity." Finally, it concluded (*ibid.* (footnote omitted)) that "[petitioner] may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity." The court acknowledged (*id.* at 7a n.4) that the new hires were also required to become union members, but concluded that "[they] cannot be the subject of discrimination based upon union loyalty and activity" because they "were not union members when they began work during the strike."

[2] The Court issued a writ of certiorari to review this decision and, on March 2, 1988, affirmed the Eighth Circuit's judgment by an equally divided vote. *TWA* v. *IFFA*, No. 86-1650. A petition for rehearing was filed, however, and, on April 18, 1988, the Court invited respondent to file a response.

The court found its conclusion supported in cases decided under the NLRA (Pet. App. 8a-10a). First, it noted (*id.* at 8a) that, in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), this Court held that an award of superseniority to permanent replacements and cross-overs unlawfully discriminates against those who engage in union activity. The court found that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here" (Pet. App. 8a), reasoning that "[a]warding the cross-overs permanent replacement status differentiates [among] employees on the basis of their union activity, induces employees to abandon the strike[,] and is likely to create long-term conflict and division within the workforce of those working together under the union security clause" (*id.* at 9a). Second, it found that "[c]ases that have followed *Erie Resistor* are more explicit concerning the treatment of cross-overs" and that those cases have expressly rejected attempts to afford cross-over employees permanent replacement status (*ibid.*, citing *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *International Ass'n of Machinists & Aerospace Workers* v. *J.L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983)).

SUMMARY OF ARGUMENT

A. The rights of economic strikers under the NLRA are well established. Striking employees are entitled to reclaim their jobs as long as those jobs remain vacant. If there are no vacancies when the strikers first offer to return to work, they are entitled to preferential consideration for vacancies that occur thereafter. An employer commits an unfair labor practice if, at the conclusion of a strike, it refuses to reinstate strikers to their former posi-

tions without prejudice to their seniority or other employment rights, unless it can show that its action was due to "legitimate and substantial business justifications." Refusing to displace permanent replacement employees is, however, such a legitimate and substantial business justification.

B. The court below misapplied these principles developed in the NLRA context in holding that senior returning strikers were entitled to displace junior cross-over employees. An employee who refuses to join or who abandons a strike has the same entitlement to retain or regain his job as a full-term striker. If his job is vacant when he returns, he is entitled to return to that job at that time. If he has stayed in or returned to his job, there is no vacancy in that position, and a returning full-term striker has no entitlement to it. The court of appeals' contrary conclusion has no foundation in NLRA case law.

The suggestion that refusing to displace junior cross-over employees with returning full-term strikers discriminates on the basis of union activity is unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill.

Nor is there any merit to the suggestion that only new hires who are recruited as permanent replacements for strikers may be treated as permanent employees. The cross-over employees were permanent employees before the strike began and, after the strike begins, the employer cannot refuse to allow them to return to their vacant jobs, or reduce their tenure in those jobs, just because other employees have gone on and remained on strike. To do so would penalize the early returnees for striking and the employees who did not strike at all for the fact that other employees engaged in strike activity. Either penalty would

place the employer in violation of the NLRA. The statute obviously should not be interpreted to be at odds with itself.

The NLRA cases cited by the court below do not support its conclusion that the full-term strikers were entitled to displace the junior cross-over employees. Those cases involve discrimination against strikers that persists after the strikers have returned to their jobs, or discrimination among strikers in selecting which ones will be offered job vacancies. No such discrimination is involved here.

C. It is possible, of course, that the RLA provides protection for returning strikers that the NLRA does not provide. But the court below did not rely on any such argument; respondent has not purported to defend the judgment below on that basis; and the relevant differences in the two statutory schemes in fact point in the opposite direction. Thus, we see no readily apparent basis for finding a reinstatement right in the RLA that entitles returning strikers to displace junior cross-over employees.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED NLRA PRINCIPLES IN CONCLUDING THAT AN RLA EMPLOYER IS REQUIRED, AT THE CONCLUSION OF AN ECONOMIC STRIKE, TO DISPLACE NON-STRIKING EMPLOYEES AND EMPLOYEES WHO RETURNED TO WORK PRIOR TO THE END OF THE STRIKE IN ORDER TO REINSTATE FULL-TERM STRIKERS WITH GREATER SENIORITY

The court below, purporting to follow cases decided under the NLRA, held that the RLA requires an air carrier, at the conclusion of an economic strike, to displace non-striking employees and employees who returned to work prior to the end of the strike in order to reinstate full-term strikers with greater seniority. We believe that the court misunderstood the rights of returning strikers under the NLRA; under that statute, senior full-term strikers are not entitled to displace junior cross-over em-

ployees. Moreover, while it is possible that NLRA-based principles concerning the rights of strikers do not apply in the RLA context, respondent has not advanced any such argument (Br. in Opp. 5-8), and, more importantly, it is doubtful that the RLA accords greater reinstatement rights to strikers than does the NLRA. Accordingly, we believe that the judgment below should be reversed insofar as it requires petitioner to replace junior cross-over employees with senior full-term strikers.

A. The NLRA deals with several aspects of the rights of striking employees. Section 7 of the statute guarantees the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. 157).[3] Section 13 of the statute provides that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right" (29 U.S.C. 163). Section 2(3) of the statute specifies that, as used in the statute, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *" (29 U.S.C. 152(3)). And Section 8(a) of the statute (29 U.S.C. 158(a)) makes it an unfair labor practice for an employer to in-

[3] Section 7 provides, in pertinent part, that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

terfere with or discriminate against employees in the exercise of their right to strike.[4] This Court has interpreted and applied these provisions in a series of important cases.

First, in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Court held that an employer may carry on its business during an economic strike with replacement employees and is not required (when the strikers desire to return) to displace replacement employees who have been promised permanent employment. The Court explained that "an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers" (*id.* at 345); that "he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them" (*id.* at 345-346 (footnote omitted)); and that he is required "to reinstate only so many of the strikers as there [are] vacant places to be filled" (*id.* at 346).[5]

[4] Section 8(a) of the NLRA (29 U.S.C. 158(a)) provides, in pertinent part, that:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

[5] The Court in *Mackay Radio* added, however, that an employer may not discriminate on the basis of union activity in determining which returning strikers will have to wait for vacancies to open (304 U.S. at 346-347). Rather, it must use a non-discriminatory criterion—such as "skill or ability" (*id.* at 347).

The Court in *Mackay Radio* did not address whether an employer must affirmatively show a need to operate with permanent replace-

The Court revisited the issue of economic strikers' rights in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).[6] In *Erie Resistor*, the Court held that an employer may not grant superseniority to replacement employees or to employees who abandon a strike, even if the employer believes that such offers are necessary to the continuance of the employer's business. The Court found, as had the Board, that "[s]uper-seniority affects the tenure of all strikers[,] whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced" (*id.* at 230); that "[s]uper-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike" (*ibid.*); that superseniority "deals a crippling blow to the strike effort," for "those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of the older employees is seriously diluted" (*ibid.*); and that "[s]uperseniority renders future bargaining difficult, if not impossible, for the collective bargaining representative," because, "[u]nlike the replacement granted in *Mackay*[,] which ceases to be an issue once the strike is over, [super-seniority] creates a cleavage in the plant continuing long after the strike is ended" (*id.* at 231). Accordingly, while it reiterated that, under

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ments. The Board has held that an employer need not do so. See *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964). In *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504-505 n.8 (1983), without deciding the issue, the Court noted that the Board's holding was consistent with *Mackay Radio* and its progeny.

[6] In *Mastro Pastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956), the Court held that unfair labor practice strikers are entitled to reinstatement even if the employer has hired permanent replacements.

Mackay Radio, an employer need not, at the conclusion of a strike, "discharge those who worked during the strike" (*id.* at 232), the Court affirmed the Board's decision that superseniority has such a devastating effect on employees, both during and after a strike, that the employer's business interest in providing superseniority does not "outweigh the damage to concerted activities" (*ibid.*).

Finally, in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Court made clear that the reinstatement rights of economic strikers are not terminated merely because no jobs are available for them at the end of the strike. Initially, the Court noted (*id.* at 378) that Section 2(3) of the NLRA provides that the employee status of a striker continues until he has obtained other "regular and substantially equivalent employment." It further noted (389 U.S. at 378 (citation omitted)) that, "[i]f, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act" and that, "[a]ccordingly, unless the employer * * * can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." The Court acknowledged (*id.* at 379) that an employer has a " 'legitimate and substantial business justification[]' " "when the jobs claimed by strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." But it concluded (*id.* at 380) that an employer does not have a "legitimate and substantial business justification" for later refusing to recall strikers when it shows only that jobs had not been available at the end of the strike, particularly where, as there, the strikers have "continued to make known their availability and desire for reinstatement."

In short, under the NLRA, striking employees are entitled to reclaim their jobs so long as those jobs remain vacant and, if there are no vacancies when the strikers first offer to return to work, they are entitled to preferential consideration for vacancies that occur thereafter. See *NLRB* v. *Fleetwood Trailer Co., supra; Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer commits an unfair labor practice if, at the conclusion of a strike, it refuses to reinstate strikers to their former positions without prejudice to their seniority or other employment rights, unless it "can show that [its] action was due to 'legitimate and substantial business justifications' " (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). Indeed, if "the employer's discriminatory conduct [is] 'inherently destructive' of important employee rights, * * * the [National Labor Relations] Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations" (388 U.S. at 34). But refusing to displace permament employees is a "legitimate and substantial business justification" that is not inherently destructive of those rights. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345-346; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 379; *NLRB* v. *Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967).[7]

[7] While the employer is not required to discharge permanent replacements to make way for returning economic strikers, the employer may accede to the union's demand that it do so. See *Belknap, Inc.* v. *Hale*, 463 U.S. at 503-504 & n.8. See also *United Steelworkers, Local 8560* (*Sparta Mfg., Div. of Spartek, Inc.*, Case No. 8-CB-3963 (Advice Mem.)), 103 L.R.R.M. 1238 (Dec. 31, 1979) (no violation of Section 8(b)(3) or (b)(2) of the NLRA (29 U.S.C. 158(b)(3) or (b)(2)) for a union to insist that seniority be used to determine the post-strike job rights of replacements and strikers). The

B. The court below plainly misapplied these principles in holding that, under precedents developed under the NLRA, the senior returning strikers were entitled to displace junior cross-over employees. As explained above (pages 8-12, *supra*), a full-term striker's reinstatement right entitles him to be recalled only when a vacancy exists. Thus, a full-term striker could have a claim on a cross-over employee's job only if the job that the cross-over employee is performing could be deemed not permanently filled during the course of the strike and, therefore, "vacant." But an employee who abandons a strike has the same entitlement to regain his job as does a full-term striker; that is, if the job is vacant at the time the cross-over employee requests reinstatement, he is entitled to return to that job at that time, just as the full-term striker is entitled to return to that job if it is unfilled at the end of the strike. Once the cross-over employee has returned to the job, there is no vacancy in that position and a returning full-term striker has no entitlement to it; likewise, with respect to employees who do not strike at all, their jobs are never vacant and full-term strikers have no claim on them. The court of appeals' contrary conclusions simply have no foundation in NLRA case law.

Board has, however, held that, in the absence of an agreement dealing with the reinstatement rights of strikers, unreinstated strikers "do not have the statutory right to recall in accordance with a collective-bargaining provision covering recall from layoffs." *Bio-Science Laboratories*, 209 N.L.R.B. 796, 796 (1974). Accord *Lone Star Indus.*, 279 N.L.R.B. No. 78, at 6 (Apr. 28, 1986). In the instant case, of course, there was no back-to-work agreement giving full-term strikers the right to bump replacements or junior cross-overs and, as the district court found (Pet. App. 22a), the collective bargaining agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike."

The suggestion by the court below (Pet. App. 7a) that, because the union security clause requires cross-over employees to retain their union membership, refusing to displace junior cross-over employees in favor of full-term strikers discriminates on the basis of union activity is equally unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill. That, of course, is precisely why the full-term strikers are not entitled to displace any employee hired permanently to replace them; the new hires are permanently filling the striking employees' jobs and, since the cross-overs are filling their own jobs, at the end of the strike there are no vacancies for the returning strikers to fill. The union security clause, which is binding on new hires as well as on cross-over employees, has no bearing on this analysis.[8]

Nor is there any merit to respondent's contention (Br. in Opp. 6) that only new hires who are recruited as permanent replacements for strikers may be treated as permanent employees and that, accordingly, cross-over employees can only be treated as temporary replacements. The cross-over employees who went on strike but returned before the strike ended had been permanent employees before the

[8] The new hires cannot, as the court below suggested (Pet. App. 7a n.4), be distinguished from the cross-over employees because the former "were not union members when they began work during the strike" and, "[t]hus, * * * cannot be the subject of discrimination based upon union loyalty and activity." Whether they are union members or not, by working during the strike, the new hires are refusing to assist the union or to engage in union-organized concerted activity. An employer may not offer these employees permanent employment or refuse to displace them for that reason. But it may offer them permanent employment and refuse to displace them for other legitimate business reasons.

strike began. Because their jobs were still available when they offered to return to work, petitioner was obliged to reinstate them without any reduction in the tenure that they had previously enjoyed in those jobs. Had petitioner refused to do so, and deemed their reinstatement subject to defeasance upon the subsequent return of other strikers with greater seniority, it would have penalized the early returnees for striking by refusing to allow them to return to their vacant jobs; and had it reduced the tenure of employees who did not strike at all, it would have penalized them for the fact that others engaged in strike activity. Neither action would have been statutorily permissible. See generally *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95 (1985). The statute obviously should not be interpreted to be at odds with itself.

The NLRA cases cited by the court below (Pet. App. 8a-10a) do not support its conclusion that the full-term strikers were entitled to displace the cross-over employees. Those cases involve: (1) discrimination against strikers that persists after the strikers have returned to their jobs; or (2) discrimination among strikers in selecting which ones will be offered job vacancies. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) (holding unlawful the grant of superseniority status to cross-over employees and new hires but not to reinstated full-term strikers); *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (unlawful for employer to place employees who worked during the strike in jobs other than those they held prior to the strike, while assigning full-term strikers to inferior jobs); *International Ass'n of Machinists & Aerospace Workers* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) (holding that a factual issue was presented concerning whether a striker who abandoned a strike had returned to his own pre-strike job or to a different job claimed by a more senior employee); *Randall,*

Div. of Textron, Inc. v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) (employer violated the NLRA by giving cross-over employees a preference over unreinstated full-term strikers in bidding on special-rated jobs). None of these cases suggests that the employer is required to create vacancies for unreinstated strikers by displacing current employees.[9]

C. This Court has cautioned, of course, that the NLRA has "no direct application" to the RLA and at best serves as an interpretive analogue. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). Thus, it is possible that the RLA provides protection for returning strikers in these circumstances that the NLRA does not provide. But the court below did not rely on any such argument, and respondent has not purported to defend the judgment below on any such basis. See Br. in Opp. 5-14. Moreover, the relevant differences in the two statutory schemes point, if anywhere, in the opposite direction.[10] In sum, the NLRA does not

[9] In *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 931 (7th Cir. 1982), the court agreed with the Board that unreinstated strikers have a right to reinstatement when a vacancy occurs. The court disagreed with the Board as to whether, in the circumstances of that case, a layoff created job vacancies. Accordingly, the court held that the employer was entitled to recall replacements and reinstated strikers from layoff status in preference to unreinstated strikers. Nothing in the court's opinion in *Giddings & Lewis* is inconsistent with the Board's position here – *i.e.*, that unreinstated strikers are only entitled to fill vacancies and not to "bump" current employees.

[10] In contrast to Section 2(3) of the NLRA, which specifies that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" (29 U.S.C. 152(3)), Section 1 Fifth of the RLA, 45 U.S.C. 151 Fifth, does not expressly include strikers within the definition of the term "employee." Furthermore, because of the differing nature of the industries regulated by the two

provide the particular right of reinstatement for returning strikers that the court below found, and there is no readily apparent basis for finding any greater right of this type in the RLA.

CONCLUSION

The judgment of the court of appeals should be reversed with respect to the question presented.

Respectfully submitted.

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MAY 1988

statutes and the different historical and legal contexts in which the two statutes were enacted, Congress apparently placed greater restrictions on the right of employees to resort to economic weaponry, including the strike, in the RLA than it did in the NLRA. See generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 378-379; *Florida East Cost Ry.* v. *Brotherhood of R.R. Trainmen*, 336 F.2d 172, 180-181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965).

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No. 87-548

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Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Airline Industrial Relations Conference (AIRCON) hereby moves this Court for leave to file the attached brief as *Amicus Curiae* in support of Petitioner Trans World Airlines (TWA). Respondent Independent Federation of Flight Attendants (IFFA) has refused to consent to AIRCON's participation in this case as an *Amicus Curiae*. Petitioner TWA has consented to AIRCON's participation.

AIRCON has a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in these areas with respect to legislative, judicial and administrative matters. Because the decision in this case will have a substantial impact on collective bargaining and the availability of self-help during strikes, AIRCON wishes to provide the Court with an industry-wide perspective on the issues raised by this case.

The instant brief suggests an appropriate interpretation and application of the Railway Labor Act (RLA) to the post-strike treatment of permanent replacements and employees who continue working by crossing picket lines (*i.e.*, "cross-overs"). Although the Railway Labor Act regulates labor relations in the air transport industry, the Eighth Circuit did not examine the RLA's impact upon the issues presented by the IFFA-sponsored strike against Trans World Airlines, but relied upon an erroneous analogy to the National Labor Relations Act (NLRA). Because the parties are concerned primarily with the decision of the Eighth Circuit which focuses on an interpretation of NLRA precedent, they may concentrate their arguments on the proper interpretation and application of that Act as a predicate for interpretation of the Railway Labor Act. AIRCON's brief suggests to the Court an alternative approach to the issues framed by the Eighth Circuit which emphasizes the unique language, legislative history, and structure of the Railway Labor Act. AIRCON believes that its argument centered upon the Railway Labor Act will be of assistance to the Court in resolving this case.

WHEREFORE, the Airline Industrial Relations Conference respectfully prays that this Motion be granted, and that the attached brief be filed.

Respectfully submitted,

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QUESTION PRESENTED

Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permamently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICUS CURIAE* THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE

INTERESTS OF *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court, the Airline Industrial Relations Conference (AIRCON) files this brief as *Amicus Curiae* in support of Petitioner Trans World Airlines (TWA).[1] AIRCON

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[1] AIRCON has filed concurrently with this brief a Motion For Leave To File Brief As *Amicus Curiae*, which is necessitated by the refusal of the Respondent Independent Federation of Flight Attendants (IFFA) to agree to AIRCON's participation in this case as *Amicus Curiae*.

adopts and supports wholeheartedly the arguments of Petitioner TWA that precedent under the National Labor Relations Act (NLRA) does not support the Eighth Circuit's ruling. As TWA argues, when IFFA abandoned its economic strike and more senior striking flight attendants attempted to return to work, TWA was not prohibited under NLRA standards from retaining flight attendants who crossed IFFA-sponsored picket lines (*i.e.*, "cross-overs"). AIRCON writes separately in order to emphasize to the Court that the court below almost entirely ignored the unique language, legislative history and structure of the Railway Labor Act and to provide an industry-wide perspective on the question before the Court.

The Airline Industrial Relations Conference has a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters. AIRCON represents its member carriers with respect to legislative, judicial and administrative proceedings in the labor relations and personnel areas. The membership of AIRCON includes virtually every major air carrier in the United States and, therefore, AIRCON's members will be directly and substantially affected in their labor relations by the resolution of this case.

The decision of the Eighth Circuit affects both the ability of carriers under the Railway Labor Act to operate during a strike and the right of employees to decline to participate in a strike and to cross picket lines. A decision which effectively requires discrimination *against* cross-overs has an obvious impact on a carrier's ability to maintain operations during a strike. Thus, this Court's decision will be of fundamental importance to carriers' determinations and ability to use self-help and, similarly, to unions' determinations and ability to initiate, maintain or prolong Railway Labor Act strikes.

For these reasons, AIRCON respectfully submits this brief as *Amicus Curiae*.

SUMMARY OF ARGUMENT

This case presents a union's challenge under the Railway Labor Act to a carrier's post-strike retention of employees who crossed picket lines (*i.e.*, "cross-overs"). IFFA's claim against TWA arises, if at all, under Sections 2 Third and 2 Fourth of the Railway Labor Act, 45 U.S.C. §§ 152 Third and Fourth. Despite the controlling effect of these provisions, the court below provided no analysis of the language and legislative history of the RLA or of the precedent developed under Sections 2 Third and 2 Fourth. Instead, the lower court applied its misperception of the precedent under the National Labor Relations Act, and it did so in direct contradiction of this Court's admonition that utmost care must be taken in drawing parallels between the NLRA and the RLA.

Had the court below examined the language and legislative history of Sections 2 Third and 2 Fourth, it would have discovered that Congress crafted those sections specifically to protect employees in the organizing context, a considerably more limited task than was intended for Sections 7, 8(a)(1), and 8(a)(3) of the NLRA, 29 U.S.C. §§ 157, 158(a)(1), and 158(a)(3). This distinction obviously restricts the relevance of NLRA principles to this case. Thus, the court below erred not only by misinterpreting NLRA precedent, but also by failing to recognize that the RLA provides much more limited protection for employee concerted activity outside the organizing context than does the NLRA.

Under the unique dispute resolution scheme created by the RLA, the rights of returning strikers have long been dealt with in the collective bargaining process, specifically in the form of back-to-work agreements. IFFA

has sought to obtain in federal court what it was unable to obtain at the bargaining table. But, the language, legislative history and structure of the RLA indicate that Congress did not intend the federal courts to impose *ad hoc* resolutions on the parties to such disputes. The decision below, if permitted to stand, will more deeply immerse the federal courts in RLA strikes and adversely affect the collective bargaining process.

ARGUMENT

I. The Court Below Erred Not Only In Its Analysis Of NLRA Precedent, But Also In Its Failure To Consider The Unique Language And Legislative History Of The RLA

AIRCON concurs completely in TWA's argument that the Court of Appeals erred in resolving the cross-over issue below because it misapplied established strike replacement precedent under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, particularly *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). But the Eighth Circuit committed a second fundamental error by deciding a case under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, exclusively on the basis of NLRA analogy and without an analysis of the applicability of the Railway Labor Act's unique provisions to the issues presented.

A. *The Eighth Circuit Ignored The Relevant Provisions Of The RLA*

The Eighth Circuit's decision does not identify the provision of the Railway Labor Act that TWA purportedly violated. It found unlawful discrimination in TWA's treatment of cross-overs, holding that:

> . . . TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity.

IFFA v. Trans World Airlines, 819 F.2d 839, 843.

The opinion, however, contains no citation to, let alone discussion of, the two provisions of the Railway Labor Act which, if any, must control this case—Section 2 Third and Section 2 Fourth, 45 U.S.C. §§ 152 Third and 152 Fourth. Sections 2 Third and 2 Fourth are the only "nondiscrimination" provisions of the Railway Labor Act that can provide any basis for federal court intervention to protect covered "employees" from employer retaliation for union-related activities. *See Teamsters v. Pan American World Airways*, 607 F. Supp. 609, 614 (E.D.N.Y. 1985) (Sections 2 Third and 2 Fourth challenge to post-strike treatment of cross-overs); *see also Machinists v. Alaska Airlines*, 813 F.2d 1038, 1040 n.1 (9th Cir.), *cert. denied*, 108 S. Ct. 290 (1987) (Section 2 prohibits employer interference). The court's statement about discrimination is, therefore, implicitly a conclusion that TWA violated Section 2 Third and Section 2 Fourth of the Railway Labor Act, for there are no other provisions of the Act that even arguably provide a statutory basis for the Eighth Circuit's decision.[2]

---

[2] The District Court more directly addressed the applicable RLA provisions and standards. The District Court expressly rejected an IFFA argument that the RLA provided *greater* protection for employee strike activity than the NLRA. *IFFA v. Trans World Airlines*, 643 F. Supp. 470, 475 (W.D. Mo. 1986). The District Court stated:

> IFFA's final argument for its contention that strikers should have the right to displace cross-overs is that the court should disregard the NLRA precedents in favor of the allegedly greater protection given employees under the Railway Labor Act. This contention, which was emphasized at oral argument, is wholly lacking in support in the cases. On the contrary, the Second Circuit has recently noted that the Railway Labor Act explicitly protects only "organizing and representational

The central flaw in the Eighth Circuit's analysis of the cross-over issue it that it relied *exclusively* upon precedent under the National Labor Relations Act applying and interpreting Sections 7, 8(a)(1), and 8(a)(3), 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3). *See* 819 F.2d at 843-45. Indeed, the underlying, unaccountable assumption of the Eighth Circuit's decision is that the RLA issue of retaining cross-overs after a strike is governed by the standards of Sections 7, 8(a)(1), and 8(a)(3) of the NLRA. But as argued more fully below, the assumed equivalence of NLRA and RLA protections of union activity in a strike is a proposition unsupported by statutory language, legislative history, or precedent.

Overall, a review of the decision below and the Railway Labor Act leads to the undeniable conclusion that there are no statutory provisions other than Sections 2 Third and 2 Fourth of the RLA which can conceivably support IFFA's claim of an RLA violation.

B. *Analogies Between The RLA And The NLRA Must Be Carefully Scrutinized*

In examining the cross-over seniority issue under Sections 2 Third and 2 Fourth of the RLA, this Court should avoid the uncritical analogy to the NLRA utilized by the court below.

The Court has repeatedly opined on the differences between the RLA and the NLRA and the necessity for only the most careful comparisons:

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rights, as opposed to the broader 'concerted activity' rights under the Wagner Act." *IUFA v. Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986).

Id. The citation to the Second Circuit's decision is significant because *IUFA v. Pan American World Airways* is a decision under Sections 2 Third and 2 Fourth which holds that those provisions have narrower application than the NLRA provisions protecting "concerted activity." Thus, the District Court clearly viewed this case as arising under Sections 2 Third and 2 Fourth of the RLA.

> It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.

Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969); *see also Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971); *Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 31 n.2 (1957). That the Eighth Circuit failed to follow the Supreme Court's directive of care in analogizing between the NLRA and the RLA should result in an even more probing analysis of the decision below.

Only last term, the Court followed its stated approach by refusing to incorporate the NLRA ban on secondary activity into the RLA after finding the absence of any statutory basis in the RLA. *Burlington Northern R.R. v. BMWE*, 107 S. Ct. 1841 (1987).[3] The Court should adopt the same approach here and focus on the unique language and limited purpose of Sections 2 Third and 2 Fourth of the RLA in resolving the question of cross-over job entitlement after a strike.

AIRCON submits that an informed analysis of the RLA's applicability to the cross-over controversy will lead the Court to conclude that the Eighth Circuit's intervention on behalf of the IFFA, after the Union's unsuccessful strike against TWA, was without statutory basis.

---

[3] *See also Landers v. National Railroad Passenger Corp.*, 56 U.S.L.W. 4355, 4356 (April 27, 1988) ("We are unwilling to read into the Railway Labor Act a right to minority union participation in company-level grievance and disciplinary proceedings that Congress declined to put there.")

II. Sections 2 Third And 2 Fourth Of The Railway Labor Act Have Limited Application Outside The Context Of A Union Organizing Campaign

Because IFFA's challenge to TWA's post-strike retention of cross-overs must arise under Sections 2 Third and 2 Fourth of the Railway Labor Act, the decision of the Court of Appeals is defensible only if it is consistent with the unique language, legislative history and structure of those statutory provisions. The court below did not appreciate that the RLA, unlike the NLRA, does not provide any generalized protection for employee "concerted activity" and that the protections included in the RLA are limited to the context of union organizing campaigns. Thus, the Eighth Circuit erred not only by misinterpreting the NLRA, but also by failing to recognize that the RLA provides a more circumscribed set of protections for employee concerted activity than does the NLRA.

A. *The Language And Legislative History Of The RLA Demonstrate An Intention To Protect Concerted Activity Primarily In The Organizing Context*

In a case such as this which arises under a complex statutory scheme, this Court looks primarily to the language of the statute for guidance. *See Caminetti v. United States*, 242 U.S. 470, 474 (1916); *see also Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1854 n.15 (describing the Court's traditional focus on the language of the RLA). An examination of the language of Sections 2 Third and 2 Fourth of the RLA reveals that these sections were carefully crafted to address *pre-certification* representation disputes, not to address issues that arise in the context of a mature collective bargaining relationship, and certainly not to address issues related to the proper application of seniority rights following a lawful strike.

For example, Section 2 Third provides in pertinent part:

> Representatives, for the purposes of this chapter, *shall be designated* by the respective parties without interference, influence, or coercion by either party *over the designation* of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its *choice of representatives.*

45 U.S.C. § 152 Third (emphasis added). By its terms, Section 2 Third prohibits interference, influence and coercion with respect to the designation or choice of representatives. The statute makes no mention of other forms of concerted activity nor does it actually use the phrase "concerted activity" or "concerted action." *Compare* 29 U.S.C. § 157 (NLRA provision protecting the right to engage in "concerted acitvities").

Section 2 Fourth is similarly focused on the pre-certification organizing context. In pertinent part, Section 2 Fourth provides:

> Employees shall have the *right to organize* and bargain collectively through *representatives of their own choosing*. The majority of any craft or class of employees shall have the *right to determine who shall be the representative* of the craft or class for purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees *to join, organize, or assist in organizing* the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way *with the organization* of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

45 U.S.C. § 152 Fourth (emphasis added). Once again, the language of Section 2 Fourth evidences a Congres-

sional intent to create a limited set of protections that apply specifically to the organizing context.

The legislative history of the RLA confirms that Congress intended Sections 2 Third and 2 Fourth to be limited to the organizing context and for the employee protections of the RLA to be more narrow than the protections created by the NLRA. *See Machinists v. Street*, 367 U.S. 740, 759 (1961) (discussing the 1934 amendments to the RLA adding Section 2 Fourth to address the company union problem). In 1936, Congress amended the Railway Labor Act to extend its coverage to include the airline industry. *See* Pub. L. No. 74-487, 49 Stat. 1189 (1936). This occurred concurrently with Congress' consideration of the Wagner Act. *See An Act to Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate or Foreign Commerce: Hearings on S. 2496 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 25 (1935). In the course of hearings on the 1936 amendments, the following exchange involving the similarity of the NLRA and RLA occurred between Senator Minton, Chairman of the Senate Committee on Interstate Commerce, and O. S. Beyer, Director of Labor Relations in the Office of the Federal Coordinator of Transportation:

> Senator Minton: The Railway Labor Act that you are speaking about up to that point is similar in character to the so called "Wagner Bill"?
>
> Mr. Beyer: No; it is not.
>
> Senator Minton: In theory?
>
> Mr. Beyer: In theory it is, *only up to the point of safeguarding employees' right to organize.*

Id. (emphasis added). It is difficult to imagine a more explicit legislative recognition that the employee protections provided by the RLA are limited to the organizing

context and are not as broad as those provided by the NLRA. *See IUFA v. Pan American World Airways*, 739 F.2d at 141 n.2.

Interpreting Sections 2 Third and 2 Fourth as primarily directed at pre-certification representation disputes is completely consistent with the statutory dispute resolution framework of the Railway Labor Act. To ensure employee freedom of choice in the selection of representatives, Congress included the judicially enforceable prohibitions on employer interference in Sections 2 Third and 2 Fourth. *See Railway Labor Act Amendments: Hearings on H.R. 7650 Before the Comm. on Interstate and Foreign Commerce of the House of Representatives*, 73rd Cong., 2d Sess. 21-23 (1934). Once a collective bargaining representative is selected by employees and certified by the National Mediation Board, the Act uses two principal mechanisms for the resolution of disputes. First, an almost interminable process of collective bargaining is established to deal with disputes over the formation of new agreements or "major disputes." *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945). Second, the Act imposes a duty upon the carrier and the union to establish a "Board of Adjustment" for the resolution of "minor disputes" which are defined as "disputes . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . . ." 45 U.S.C. §§ 153(i) and 184.

When Congress enacted the NLRA and its broad protections under Sections 7, 8(a)(1), and 8(a)(3) for employee concerted action, it also created a quasi-judicial administrative agency with special expertise in labor relations to enforce those broad protections. *See Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967) (describing NLRB jurisdiction); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (describing NLRB expertise). In contrast, conspicuously absent from the RLA scheme is any analogue to the National Labor Relations Board's

jurisdiction over unfair labor practice charges. This absence can be explained by the reliance of the Railway Labor Act upon private dispute resolution procedures of negotiation and arbitration. The private and consensual character of the Railway Labor Act—itself a product of negotiation [4]—has also circumscribed the judicial role for enforcement of the RLA to intervention to ensure that the Act's procedures for resolving major, minor, or representation disputes are functioning. *Air Line Pilots v. Texas Int'l Airlines*, 656 F.2d 16, 19-20 (2d Cir. 1981).[5] The absence of an enforcement agency analogous to the NLRB and the limited role for judicial enforcement under the RLA strongly support a narrow reading of Sections 2 Third and 2 Fourth.

In short, the language, legislative history and structure of the RLA demonstrate that Sections 2 Third and 2 Fourth are narrow-gauge provisions intended to protect employees engaged in organizing activity. It is simply erroneous to equate these RLA provisions to Sec-

[4] The Supreme Court has recognized that the Railway Labor Act was negotiated between carriers and unions and has relied upon this fact in holding that it creates limited restraints upon self-help and the collective bargaining process. *Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1852 n.13; *see also Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548, 560-64 (1930).

[5] *See IUFA v. Pan American World Airways*, 789 F.2d at 141 ("Running through Congress' exacting allocation of administrative jurisdiction is a 'thread' of judicial intervention in cases in which, 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'"); *APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW) (judicial intervention under the RLA only when "the essential framework for bargaining between management and the union has broken down."); *see also Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 581 (1971) (major disputes); *Machinists v. Northwest Airlines*, 673 F.2d 700, 707-08 (3d Cir. 1982) (minor disputes); *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (representational disputes).

tions 7, 8(a)(1), and 8(a)(3) of the NLRA, which provide broad protection to almost all types of employee concerted action and apply both before and after a collective bargaining relationship has been established.

B. *Courts Have Circumscribed Post-Certification Application Of Sections 2 Third And 2 Fourth*

In *Texas & New Orleans R.R. v. Railway Clerks*, 281 U.S. 548 (1930), this Court's first and only application and interpretation of Section 2 Third, the Court recognized that the core purpose of that provision is to protect organizing activities. The Court held that there was a private cause of action to enforce Section 2 Third in federal court, but this holding was limited to the protection of unrepresented employees from carrier retaliation for union organizing activity. In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), this Court examined the rights created by Section 2 Fourth in the context of a court challenge to a representation determination of the National Mediation Board (NMB). The Court concluded that Congress intended the NMB's representation procedures under Section 2 Ninth, 45 U.S.C. § 152 Ninth, rather than the federal courts, to be the principal enforcement mechanism for representation rights under Section 2 Fourth. *Id.* at 300-03; *see also Railway Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659 (1965); *Machinists v. Street*, 367 U.S. at 759.

For over fifty years, the lower courts have followed this Court's lead and enforced Sections 2 Third and 2 Fourth principally to protect the RLA's representation procedures and to ensure the employees a free choice of union representation. *See, e.g., Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984); *Stepanischen v. Merchants Despatch Transp. Co.*, 722 F.2d 922 (1st Cir. 1983); *Adams v. Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979), *aff'd*, 654 F.2d 452 (6th

Cir. 1981); *Kent v. Fugere*, 438 F. Supp. 560 (D. Conn. 1977).

Since *Texas & N.O.R.R.*, unions and represented employees have also attempted to secure judicial enforcement of Section 2 Third, and Section 2 Fourth, outside of the organizing context. With markedly few exceptions, however, courts have resisted these efforts and have adhered to Congress' clear intent to restrict these provisions. As one court recently stated:

> Sections 152 Third and Fourth by their own terms apply to the designation and choice of representatives, and section Fourth specifically prohibits employer interference with formation of the labor organization. Courts generally have given limited scope to this special statutory protection for the formation of labor organizations, and have held that section 152 Third and Fourth give limited rights outside the context of a representation contest.

IUFA v. Pan American World Airways, 620 F. Supp. 447, 455 (S.D.N.Y. 1985), *aff'd*, 789 F.2d 139 (2d Cir. 1986) (citations omitted); *see also Machinists v. Northwest Airlines*, 673 F.2d at 707; *Rachford v. Evergreen Int'l Airlines*, 596 F. Supp. 384, 386 (N.D. Ill. 1984).

In refusing to consider post-certification claims under Sections 2 Third and 2 Fourth, courts have often noted that once a union is certified by the National Mediation Board and one of the RLA's non-judicial, dispute resolution mechanisms is available to deal with the labor-management controversy in question, there is limited need for federal court involvement. *See Machinists v. Northwest Airlines*, 673 F.2d at 707. Conversely, the cases in which courts have exercised jurisdiction over a Section 2 Third or Section 2 Fourth claim outside of the organizing context, all involve extraordinary factual patterns which have resulted in the Act's dispute resolution procedures being rendered ineffective. *See, e.g., Brady v. Trans World Airlines*, 401 F.2d 87, 93 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (breach

of the duty of fair representation); *Trainmen v. Central of Georgia Ry.*, 305 F.2d 605, 608-09 (5th Cir. 1962) (Adjustment Board procedure rendered ineffective). *But see Machinists v. Eastern Airlines*, 320 F.2d 451, 454 (5th Cir. 1963) (limiting *Central of Georgia* to its facts); *APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW).

C. *Sections 2 Third And 2 Fourth Should Be Given Limited Post-Certification Application*

AIRCON does not believe that it is necessary in this case for the Court to define definitively the scope of judicial enforcement of Sections 2 Third and 2 Fourth. But the Court should recognize that Sections 2 Third and 2 Fourth do not provide the type of pervasive protection for "concerted activity" provided by Sections 7, 8(a)(1), and 8(a)(3) of the NLRA. Rather, the RLA provisions are intended only as statutory protections of the employees' free choice of a representative through the representation procedures administered by the National Mediation Board.

If Sections 2 Third and 2 Fourth are to be given *any* post-certification application, then it should be limited to circumstances where the Act's non-judicial dispute resolution procedures have been rendered ineffective or, alternatively, where a carrier has undertaken a sustained effort to "destroy a union" or otherwise made a "fundamental attack on the collective bargaining process." *Machinists v. Alaska Airlines*, 813 F.2d at 1040; *see also APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW); *IUFA v. Pan American World Airways*, 789 F.2d at 141-42; *Machinists v. Northwest Airlines*, 673 F.2d at 708-09. The mere allegation that a particular action may have an adverse impact on a union is simply insufficient to create federal court jurisdiction under Sections 2 Third and 2 Fourth in a post-certification context. *Machinists v. Alaska Airlines*, 813 F.2d at

1040-41; *Machinists v. Northwest Airlines*, 673 F.2d at 709. As discussed more fully below, the issue of retention of cross-overs in an economic strike meets neither of these narrow potential exceptions allowing post-certification enforcement of Section 2 Third and Section 2 Fourth.

III. Sections 2 Third And 2 Fourth Do Not Prohibit The Post-Strike Retention of Cross-Overs

A. *The RLA Places Few Restrictions On The Use Of Self-Help After The Exhaustion Of The Collective Bargaining Process*

As demonstrated above, Section 2 Third and Section 2 Fourth were enacted for the specific purpose of protecting employees from carrier interference in union organizing drives, *prior to* the National Mediation Board's certification of a union as exclusive bargaining representative. Accordingly, Section 2 Third and Section 2 Fourth have little, if any, relevance to questions of a carrier's exercise of self-help in collective bargaining disputes *after* a union has been certified and *after* exhaustion of the RLA "major dispute" procedures.

Until recently, lawful strikes under the Railway Labor Act have been relatively rare phenomena. This is not surprising because the Act's major dispute procedures for resolving collective bargaining disputes are "virtually endless", encompassing "negotiation, mediation, voluntary arbitration, and conciliation." *Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1850; *see also Detroit & Toledo Shore Line Ry. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969); *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 378. Yet implicit in the Railway Labor Act is the parties' right to engage in economic self-help once the Act's procedures are exhausted. *Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 290-91 (1963); *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 244 (1966).

This Court has been hesitant to interpret the RLA as constraining the parties in their ultimate exercise of self-help. In *Burlington Northern R.R. v. BMWE*, 107 S. Ct. 1841, the Court rejected a carrier argument that the RLA contains a limitation on union secondary boycotts derived from the Act's structure and an analogy to the NLRA. Quoting the Court's prior decision in *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 392, the Court stated:

> [P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law.

107 S. Ct. at 1852. The Court also has recognized a carrier's right to self-help by authorizing the modification of existing agreements during a strike in order to permit continued operations. *See Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), *as analyzed in, Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1853 n.14.

If, as advocated by IFFA and implicitly supported by the Eighth Circuit, Sections 2 Third and 2 Fourth apply to a post-certification exercise of lawful self-help, then the Court would be creating a new and higher level of judicial intervention in major disputes. Such an expansion in application of Sections 2 Third and 2 Fourth, more than fifty years after *Texas & N.O.R.R.*, is not justifiable under the language, legislative history or the structure and purposes of the RLA.

B. *The Lower Courts Are Divided Concerning The Application Of Sections 2 Third And 2 Fourth In Lawful Strikes*

A number of federal courts have recently applied Section 2 Third and Section 2 Fourth in strike situations. The Seventh Circuit and First Circuit recently have

cited these provisions to restrict carrier self-help under the RLA. These decisions commit the same fundamental error: they fail to consider the unique characteristics of the RLA which, as *Burlington Northern* holds, regulates self-help less than the NLRA.

The Seventh Circuit in *Air Line Pilots v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), found unlawful, in part under Sections 2 Third and 2 Fourth, a carrier effort to rebid all pilot positions on the airline during a strike. In reaching this conclusion, the court relied heavily on an analogy to Section 8(a)(3) of the NLRA. 802 F.2d at 897-98. Like the Eighth Circuit's decision below, the Seventh Circuit's decision is suspect because that court failed to address the pre-certification focus of Sections 2 Third and 2 Fourth of the RLA. *Id.*

In *RLEA v. Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S .Ct. 102 (1987), the First Circuit found that job abolishments imposed by a carrier against strikers and sympathy strikers violated Section 2 Fourth as discriminatory retaliation for union activity. The facts involved the volatile and controversial Maine Central dispute, which the Court reviewed in *Burlington Northern*. The First Circuit also relied upon a broad reading of Section 2 Fourth that seems inconsistent with its own prior decision in *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d at 927, which recognized that Section 2 Fourth was directed toward protecting organizing activity.

In contrast, the Ninth Circuit recently considered a factual record akin to the current dispute in *Machinists v. Alaska Airlines*, 813 F.2d 1038. In a recall of sympathy strikers after a strike, the carrier gave priority to permanent replacements and employees who had crossed the picket lines. The union challenged the recall under Sections 2 Third and 2 Fourth. The Ninth Circuit found no violation of those provisions. It noted that the Section 2 Third and 2 Fourth cases relied upon by the union involved either (1) pre-certification cases of "individual employees who alleged they were discharged for attempting to organize a union," 813 F.2d at 1040, or (2) "a fundamental attack on the collective bargaining process" or "a direct attempt to destroy a union", 813 F.2d at 1040. Because the union presented a seniority question and a current agreement covered the sympathy strikers, the Court of Appeals concluded that the seniority rights of recalled strikers was a minor dispute within the exclusive jurisdiction of an adjustment board.[6] *See also Teamsters v. Pan American World Airways*, 607 F. Supp. at 614 (sympathy strikers do not state Section 2 Third claim relating to order of recall; seniority issues are a minor dispute). In contrast, here, where no collective bargaining agreement provision was applicable, the cross-over issue is committed to collective bargaining.

AIRCON submits that the Ninth Circuit's analysis of a strike recall issue under Sections 2 Third and 2 Fourth is correct as a matter of law. The provisions were not intended to be applicable after union certification. Therefore, unless a union can establish a "fundamental attack on the collective bargaining process", judicial intervention under Section 2 Third and Section 2 Fourth with respect to strike replacement issues is inappropri-

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[6] The Ninth Circuit appreciated that the real complaint underlying the allegation of statutory violations was that the union had not prevailed in its contest of economic muscle against the carrier:

> [The union] does not contend that Alaska [Airlines] was attempting to interfere with the workers' choice of a bargaining representative; the union alleges only that the recall plan weakens their union by replacing members, and so violated the RLA. This roundabout effort to reach a statutory violation is not a sufficient ground for a court to assume jurisdiction.

813 F.2d at 1040-41.

ate. Whether the fact patterns in the *United Air Lines* or *Boston & Maine* cases could have met that necessary standard of carrier action cannot be determined retrospectively. But certainly, those cases' facile analogy between the NLRA and the RLA in applying Sections 2 Third and 2 Fourth should not be extended to support a general rule prohibiting the retention of cross-overs after a strike.

C. *Sections 2 Third And 2 Fourth Have No Application In The Present Case*

The Railway Labor Act provides a mechanism for resolving the cross-over dispute that IFFA has sought for the federal courts to decide—*collective bargaining*. Under the RLA, the rights of returning strikers are a well-recognized topic of bargaining and, historically, such rights have been protected by means of back-to-work agreements.[7]

For whatever reasons, IFFA and TWA were not able to reach a back-to-work agreement that covered the rights of the returning strikers in the instant case. Now, by means of this litigation, IFFA is attempting to achieve the very protections it did not obtain in bargaining. However, the absence of an agreement does *not* indicate a failure of the collective bargaining process necessitating judicial intervention. It may simply indicate that one or both parties have been inflexible in their

[7] AIRCON records indicate that since deregulation there have been nineteen strikes in the industry and fifteen have ended with back-to-work agreements. *See, e.g., Air Line Pilots v. United Air Lines*, 802 F.2d at 894 (7th Cir. 1986); *Fechtelkotter v. Air Line Pilots*, 693 F.2d 899, 900 (9th Cir. 1982); *Machinists v. Alaska Airlines*, 639 F. Supp. 100, 101 (W.D. Wash. 1987); *Machinists v. Alaska Airlines*, 124 L.R.R.M. (BNA) 2458, 2459 (W.D. Wash. 1986); *Teamsters v. Pan American World Airways*, 607 F. Supp. at 610; *Texas Int'l Airlines v. AFA*, 498 F. Supp. 437, 441 (S.D. Tex. 1980), *aff'd* 667 F.2d 1169 (5th Cir. 1982). *See infra* note 9.

bargaining demands. But the Court should not encourage the parties to litigate for the purposes of obtaining negotiation leverage. As the Court noted in *Burlington Northern*:

> An injunction does not settle a dispute—it simply disables one of the parties. Moreover, . . . the availability of such self-help measures . . . may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle . . . .

107 S. Ct. at 1854.[8]

Viewed in this context, the language and legislative history of the Railway Labor Act become even more compelling. Congress drafted two limited provisions, Sections 2 Third and 2 Fourth, to protect employee rights in the organizing context. For the post-certification period, Congress established a delicately balanced set of dispute resolution mechanisms. The disputes that underlie this litigation have been statutorily committed by Congress to the RLA bargaining processes and have historically been resolved in that manner. The federal courts are not authorized by the statute to impose a contract on the parties in the form of a back-to-work mandate.

[8] In another case between the parties, subsequently decided, *IFFA v. Trans World Airlines*, 682 F. Supp. 1003 (W.D. Mo. 1988) (WESTLAW), the court rejected an IFFA claim that TWA had violated Section 2 First through its bargaining approach. In reaching its conclusion, the court noted:

> IFFA had caused many millions of dollars of damage to TWA, and had vigorously 'roasted' the new ownership. It is not a function of the court to insist that an employer cheerfully accept strike losses or show generosity in victory. A lawsuit should protect a party from the proven results of illegal conduct but does not serve as a safety net insuring against all forms of grievous injury.

WESTLAW slip op. at 59.

IV. The Eighth Circuit's Decision On Cross-Overs Is Harmful To Labor-Management Relations In The Airline Industry

When analyzed from a practical perspective of labor-management relations in the airline industry, the Eighth Circuit's decision is indefensible because of the pernicious effects that it will have on carriers and employees. Even more significant, the ruling below will interject the federal courts into airline collective bargaining in a manner that will have a serious destablizing effect.

In the extraordinarily competitive, post-deregulation airline industry, an air carrier confronted with a work stoppage of any duration has a strong impetus to attempt to operate. In the current environment, market share lost during a strike may never be regained or may only be regained at a great cost to future profitability.[9]

The Eighth Circuit's decision will seriously undermine a carrier's efforts to avoid these dire economic consequences by substantially handicapping its ability to

[9] During the past decade, labor relations in the airline industry have undergone a fundamental transformation. As a result of the Airline Deregulation Act of 1978, 49 U.S.C. § 1301 *et seq.*, unprecedented competitive pressures have disrupted labor market stability and heightened the confrontational dimension of collective bargaining. Virtually every major air carrier has experienced some form of labor strife and the federal courts have been challenged with the unprecedented task of applying the Railway Labor Act to this volatile environment. *See supra* note 7. In the 1980's alone the industry has suffered several important strikes: in 1980-81 Continental was struck by the Union of Flight Attendants and Pacific Southwest Airlines was struck by the Southwest Flight Crew Association; in 1982 Northwest was struck by the International Association of Machinists; in 1983 Continental was struck by the Machinists; in 1985 United Air Lines was struck by the Air Line Pilots, Alaska Airlines was struck by the Machinists, and Pan American was struck by the Transport Workers Union; in 1986 Trans World Airlines was struck by the Independent Federation of Flight Attendants.

maintain any semblance of normal operations during a strike. After all, few junior employees will accept the psychological and even physical risks of crossing a picket line when they know that, after the strike, they will almost certainly be displaced by senior returning strikers. Without some critical mass of experienced employees who are willing to cross picket lines and work during a strike, the chances of a carrier successfully operating during a strike are greatly reduced, particularly if the striking union represents more highly skilled employees for whom there is limited availability of permanent replacements (*e.g.*, pilots or mechanics). Moreover, once unions realize that carriers will be unable to operate, an important deterrent to strikes will be lost.

The Eighth Circuit's decision also penalizes junior employees unfairly. Consider, for example, the plight of a junior employee in a strike during which the carrier attempts to continue operations. Once the carrier starts to hire permanent replacements, the Eighth Circuit's decision will make the junior employee's options very unappealing: (1) the employee can remain on strike, have his or her position filled by a permanent replacement and, at the conclusion of the strike, he or she can wait (possibly years) for a vacancy to occur; or (2) the employee can cross-over but, if the Eighth Circuit is correct, the low seniority employee will be replaced by a more senior, returning striker at the conclusion of the strike. This result is unfair to the junior employee because, even if he or she works during the strike, he or she cannot achieve as secure a status as a new-hire, permanent replacement. *See Belknap v. Hale*, 463 U.S. 491 (1983). Thus, rather than protecting a junior employee's freedom to engage in or to refrain from striking, the Eighth Circuit effectively mandates that a junior employee join the strike as his or her best hope for securing a position. Alternatively, the decision of the Eighth Circuit encourages a junior employee to pursue the

dubious course of resigning and seeking re-employment (without seniority) as a permanent replacement.

Finally, the Eighth Circuit's decision will have a destabilizing effect on labor relations by making it more difficult to negotiate back-to-work agreements. Historically, such agreements have been used in the airline industry to resolve voluntarily not only issues related to the rights of strikers vis-a-vis replacements and cross-overs, but also questions related to discipline for strike-related misconduct, pension and health and welfare contributions for the period of the strike, settlement of other related litigation and the order of recall in connection with the resumption of normal operations. *See supra* note 7. By interpreting the RLA in an interventionist manner, the Eighth Circuit has virtually assured that these useful agreements will become less common. When negotiating back-to-work agreements, carriers will undoubtedly seek some protection for employees who crossed over during the strike. Unions, however, will find it politically difficult to concede on this point because such a concession would necessarily involve a waiver of the "statutory rights" created by the Eighth Circuit. Thus, the Eighth Circuit's prohibition on retaining cross-overs will, paradoxically, make the resolution of strikes more difficult.

Indeed, this once again raises the central flaw of the Eighth Circuit's decision: without a statutory basis, the federal courts are being interjected into what has heretofore been committed to collective bargaining. The entire history of labor legislation in this country and particularly the Railway Labor Act, however, has been based upon the premise that issues between labor and management are better resolved through private negotiation than through legislative or judicial intervention. The decision of the Eighth Circuit should be reversed as an important reaffirmation that this policy is still predominant.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* The Airline Industrial Relations Conference urges that the Court reverse the decision below.

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No. 87-548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging reversal of the decision of the United States Court of Appeals for the Eighth Circuit. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for the Respondent to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interest of its member-employers in important employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation. E.g., *Laborers' Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, ——— U.S. ———, 98 L. Ed. 2d. 936 (1988); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. ———, 89 L.Ed. 2d. 616 (1986); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979).

4. The instant case presents an issue of great significance for the Court—i.e. the right of crossover employees to avoid displacement at the end of an economic strike by full-term strikers with more "seniority." Specifically, the Court must decide whether employees who wish to continue working during a strike, or wish to abandon a strike and return to work, have lesser rights upon termination of the strike than returning strikers with greater seniority. That is, must crossovers create vacancies for the strikers who remained out and were "permanently" replaced.

5. This issue is of vital concern to the Chamber and all its member-employers. Although this case arose under the Railway Labor Act, the Eighth Circuit relied on general labor law principles in reaching its conclusion, and, thus, the decision has an impact on any member-employer who has collective bargaining agreements with unions or who has refused to displace crossovers to make room for returning strikers with greater seniority. The granting of this motion will enable the Chamber to present the broader perspective of employers not covered by the RLA.

6. The Eighth Circuit's decision in the instant case represents a radical departure from what the Chamber, and its member-employers, have understood to be well-settled principles with regard to the reinstatement rights of strikers. If this Court adopts the same rationale, it will dramatically alter the balance of power in the collective bargaining system—tipping it in favor of unions—and severely impinge on an employer's ability to maintain business operations during an economic strike.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioner Trans World Airlines.

Respectfully submitted,

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OCTOBER TERM, 1987

No. 87-548

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

For the purpose of brevity, the Chamber respectfully requests that the Statement of Interest contained in the accompanying Motion for Leave to File a Brief *Amicus Curiae* be incorporated into this brief by reference.

SUMMARY OF THE CASE

Trans World Airlines, Inc. (TWA) and the Independent Federation of Flight Attendants (IFFA) were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. Following written

notice under Section 6 of the Railway Labor Act (RLA) (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA.[1] On March 7, 1986, approximately two years after negotiations began, IFFA called a strike against TWA. For the purposes of this action, it has been assumed the strike was over only economic issues.[2]

In order to avoid interruption to its services, TWA operated with those flight attendants who wished to continue or resume working (so-called crossovers), and also hired additional replacements for the striking flight attendants to complete this workforce.

On May 17, 1986, the IFFA, on behalf of striking flight attendants, offered to return to work. There was no back-to-work agreement and no successor to the 1981-1984 Agreement. At that time, some 1,280 crossover flight attendants were working for TWA as replacements for the striking attendants. These crossover employees were employed by TWA along with approximately 1,200 permanent replacements hired during the first week of the strike, and an additional 1,600 replacements, 400 of whom were about to complete their training, when the union called off its unsuccessful strike.

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[1] While this case arose under the RLA, the holding is applicable to most unionized employers since the Eighth Circuit relied on National Labor Relations Act principles for its rationale.

[2] An economic strike protests wages, hours, or terms and conditions of employment. An unfair labor practice strike protests an employer's commission of unfair labor practices. While the employer is not permitted to hire permanent replacements during the course of an unfair labor practice strike, the employer does have the right to promote his legitimate business interests, and hire these replacements, during a strike over economic issues. *See*, C. Morris, *The Developing Labor Law*, 226 (1983).

IFFA commenced this action by filing a complaint on May 30, 1986 in the district court.[3] In evaluating the matter, the district court relied on the decision of *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938) ("Mackay Radio"), and held that fully-trained new hires could not be displaced by economic strikers. However, it created an exception permitting strikers to displace the permanent replacements who had not quite completed their training by the May 17 date, but stayed its order for displacement of these flight attendants, pending the appeal.

With respect to the crossovers, the district court relied on the principles of *Mackay Radio* and upon *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("Erie Resistor"). In doing so, the court determined that none of the crossovers were subject to displacement by unreinstated strikers.

On appeal, the Eighth Circuit affirmed the district court's judgment that the new hires, other than the "trainees," were employed as permanent replacements and, therefore, were not subject to displacement by returning economic strikers. The court, however, reversed the district court's holding with respect to the crossovers, finding that

> . . . TWA may not accord crossovers permanent status and prevent full-term strikers from displacing crossovers with less seniority because such action

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[3] IFFA's complaint alleged two claims. First, it sought declaratory judgment and injunctive relief requiring TWA to reinstate 3,000 full-time strikers, displacing some 1,200 replacements hired during the first week of the strike, 400 replacements hired before May 17, 1986, and the crossovers, on the grounds that flight attendants to be displaced were not permanent replacements. Second, the union sought similar relief as to all replacements, alleging that TWA had no business justification for hiring permanent replacements.

impermissibly discriminates among union members based on the degree of their union activity.

819 F.2d at 843.

In doing so, the Eighth Circuit acknowledged that economic strikers are entitled to reinstatement as vacancies occur, but reaffirmed the position that employers need not discharge permanent replacements to make room for these striking employees. Purporting to rely on *Mackay Radio*, the court below held that only new hire permanent replacements, *not crossovers*, could retain their jobs at the end of the strike, and only if they completed their training before the end of the strike.

SUMMARY OF ARGUMENT

The decision of the court below must be reversed because, in its holding, the Eighth Circuit has dramatically limited the rights of employees who choose not to participate in an economic strike. Essentially, the decision below establishes a novel and irrational departure from the long accepted relationships between management, labor strikers and non-strikers. The practical effect of the Eighth Circuit's unprecedented decision is to tip the balance of bargaining power in favor of unions and to eviscerate one of the employer's principle self-help weapons in response to a strike—the right to retain employees who choose to work during a strike.

In addition, the lower court's decision also creates the anomaly that employees newly hired as replacements for strikers after the strike begins need not yield to strikers' job claims, but employees with years of service, who exercised their right not to join the strike, must sacrifice their jobs to these same strikers. Thus, the Eighth Circuit's decision limits employee incentive to return to work —prolonging a divisive situation—and eroding the underlying bargaining structure.

Finally, the result of the decision below is to force employers to look outside the bargaining unit to maintain operations during a strike. The impact on the collective bargaining system as a whole is harmful. Thus, for this reason and those previously noted, the decision of the Eighth Circuit must be reversed.

ARGUMENT

I. SCOPE AND IMPLICATIONS OF THE ISSUE

The success of the collective bargaining process has always depended on the balance of pressures on the negotiating parties to reach an agreement. The history of this relationship between employers and their economic strikers reveals a balancing of two basic considerations: first, that employees need not fear a retalitory denial of the opportunity to work as to render illusory their right to strike for better economic conditions; second, that the employer should be free to continue operating its business in the face of an economic strike.[4] Under this system, employers have generally been made more conciliatory by the potentially disasterous effects of a strike, and employees have been restrained by the knowledge that they can be permanently replaced.[5]

Now, however, in broad language, not limited to a specific factual situation or to the Railway Labor Act, the Eighth Circuit has swept away this relative stability in the framework in which collective bargaining takes place. Their decision tips the balance of economic power in favor of unions whose actions may or may not coin-

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[4] C. Morris, *The Developing Labor Law*, 226 (1983).

[5] In *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Court first announced that an employer could offer permanent replacement status to those individuals who had replaced economic strikers.

cide with the interests and freedom of choice of all employees.

The unfortunate meaning of the lower court's decision is that economic strikers are entitled not only to vacancies existing at the time they seek reinstatement—a rule under which both employers and unions have long operated.[6] Rather, under the Eighth Circuit's holding in this matter, an economic striker is entitled to *displace* any less senior employee who, in order to preserve his job, has exercised his protected right not to engage in concerted activities or to return to work during a strike.

This new rule established by the lower court is not based on any reasonable extension of established precedent thought necessary to respond to changing economic realities. Instead, the lower court clearly misunderstood, and misapplied, well established authority with the result of effecting considerable change in the balance of power between parties during a strike. Thus, the Court must reverse the holding of the Eighth Circuit and re-affirm the longstanding practice of allowing crossovers to continue their employment after a strike.

II. THE LOWER COURT'S DECISION WOULD SUBSTANTIALLY INTERFERE WITH AND ALTER THE BALANCE OF POWER IN THE COLLECTIVE BARGAINING SYSTEM

A. The Employer Has The Right To Hire Replacements During An Economic Strike

A fundamental feature of our free collective bargaining system is the right of an employer to hire strike replacements and maintain operations during an economic strike. It is this well-settled rule that was announced in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). In *Mackay Radio*, the Court held that:

[6] *Id.*

> An employer . . . has the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those *hired to fill the places of strikers*, upon the election of the latter to resume their employment, in order to create places for them . . . [It is] not an unfair labor practice . . . to reinstate only so many of the strikers as there [are] vacant places to be filled."

304 U.S. at 345-46 (emphasis added).

With this ruling, the Court recognized both the right of employers to hire strike replacements *and* the right of employees who choose not to join the strike—so-called crossovers—to continue their employment after a strike.

For nearly fifty years, until the lower court's decision in this case, employers relied on the Court's instruction that they were not bound to discharge those *hired to fill the places of strikers*. Based on this right, then, the usual and lawful method of obtaining workers during a strike was to inform employees that they would be replaced if they went on strike and to offer permanent employment to replacements. This system was consistent with the doctrine established in *Mackay Radio* and satisfied the needs of both employees and employers. The employer is able to maintain a workforce to operate his business *and* the employee has the freedom to exercise his choice whether to participate in concerted activity or continue with employment.

By deviating from this general rule, the lower court impinges on the delicate balance of rights that the Court in *Mackay Radio* sought to preserve. By denying crossovers permanent replacement status, the Eighth Circuit's ruling virtually eliminates any incentive junior employees have to work during a strike. Once the employee chooses to work during the strike—as a means of assuring that his job will be secure—he runs the risk of displacement at the strike's end. Thus, the decision of the court below

imposes a severe penalty on employees for exercising their statutory right not to engage in concerted activity.

To combat the grave consequences of this situation, employees who wish to work during a strike, to protect their jobs, will be forced to resign their employment, sacrifice their seniority, and seek re-employment as new hires.[7] Only with this status as a "new hire" can the employee protect himself against displacement at the strike's end.

B. Unions Should Not Be Allowed To Use An Economic Strike To Poison The Collective Bargaining Process

While an economic conflict is an essential and legitimate feature of our collective bargaining system, a strike should not prove occasion for terminating the bargaining relationship. The strike is the means of resolving the dispute—not for destroying the underlying bargaining structure.[8] The Court has recognized both the importance of the bargaining structure and the devastating impact particular tactics will have on this structure, and, for this reason, has limited the means permitted to secure permanent replacements.[9]

In *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221 (1962), the Court held that grants of superseniority to replacement employees during an economic strike went

[7] The unlikely prospect of that event highlights the illogic of the holding below, as well as the extent to which it would impermissably interfere with the right of an employer to operate during a strike and the right of employees to refrain from engaging in concerted activity.

[8] This has come to be known as the "bounded conflict" principle—a form of limited warfare, cabined by a set of rules to make sure the bargaining relationship survives the conflict. *See*, S. Estreicher, *Strikers and Replacements*, 3 Lab. Law. 897 (1987).

[9] The concern in these instances should be on making sure the "costs" associated with conflict do not threaten the survival of the bargaining structure. *Id.* at p. 898.

beyond the right of replacement sanctioned in *Mackay Radio*. According to the Court, *Mackay Radio* does not authorize replacement programs which "create cleavage in the plant continuing long after the strike ended." 373 U.S. at 316.[10]

However, the Eighth Circuit's reliance on *Erie Resistor* is ill-founded, as this case had nothing whatsoever to do with entitlement to reinstatement. Rather, the concern in *Erie Resistor* was post-reinstatement treatment which operates to fix active employees into two categories: those that went on strike and those who did not. No such post-reinstatement discrimination results from retention of crossovers. These employees are merely being allowed to retain their jobs during the course of an economic strike. Despite the lower court's fear, the level of divisiveness in the work force will be much greater if strikers have the right to displace these crossovers.

Moreover, the hostility between factions of employees—depending on their original choice of whether to participate in the strike—will have a devastating impact on their ability to act as an organized force in future collective bargaining proceedings. The lower court has simply not recognized that a reinstatement policy that favors striking employees over crossovers creates a far more explosive situation than the mere retention of the crossovers. By allowing displacement of crossovers at the strike's end, tl court below endangers the ability of the workforce to act as a unified bargaining group and, thus, jeopardizes future labor/management negotiations.

Finally, the obstruction of this normal process of combatting strikes reduces the employers' ability to avoid

[10] Similarly, in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Court reiterated its rule that there are limits to the economic weapons parties may use precisely because they would have a traumatic impact on the bargaining relationship once the strike ends.

strikes as well as to weather them. *See, Belknap, Inc.* v. *Hale*, 463 U.S. 491, 515 n.2 (1983) (Blackmun, J. concurring). To curtail the self-help available, and to focus it on parties outside the bargaining relationship, changes the atmosphere in which negotiation occurs and makes it less likely to succeed.[11]

III. THE LOWER COURT'S DECISION IS UNSUPPORTED BY LAW OR LOGIC

A basic flaw in the lower court's decision is its erroneous foundation. To begin with, employees who elect not to strike or who work during a strike simply need not be treated as replacements in order to retain their jobs at the end of the strike. *See e.g., P.C. Food Markets, Inc.*, 282 N.L.R.B. No. 122, 124 L.R.R.M. 1174 (1987). Therefore, crossover employees have not commonly been spoken of as "replacements" except as they may have been intended to be included in that term for the purpose of describing those who may retain their jobs upon termination of a strike.

Secondly, employees who offer to return during a strike have a *continuing right to reinstatement* when vacancies occur. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Yet the lower court's determination effectively destroys both principles, since by allowing the replacement of non-strikers, the court has mandated that the reinstatement of crossovers will be only be temporary.

The lower court's decision also ignores a third principle—namely that there is no statutory requirement that strikers be reinstated in seniority order absent a back-to-work agreement to that effect. *P.C. Food Markets, Inc., supra*, 282 N.L.R.B. No. 122, *slip op.* at 6; 124 L.R.R.M.

[11] In *Burlington Northern Railroad* v. *Brotherhood of Maintenance of Way Employees*, the Court recognized that the availability of self-help measures increases the incentive for settling disputes short of disruptive strikes. 55 U.S.L.W. 4276 at 4582 (U.S. April 28, 1987).

at 1176. Although the lower court found that TWA had no contractual obligation to reinstate strikers in any particular order, the result of the decision implies such a right exists as matter of law.[12] Thus, because the Eighth Circuit has effectively ignored these well-established principles—and altered the balance of power between the parties in an economic strike situation—reversal by this court is necessary to combat this dramatic change in the law.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse the judgment of the Eighth Circuit and hold that crossover employees cannot be displaced by striking employees with greater seniority at the conclusion of an economic strike.

Respectfully submitted,

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[12] In the alternative, the law is clear that returning strikers cannot be deprived of their prestrike seniority. *NLRB* v. *Anvil Products, Inc.*, 496 F.2d 94, 95 (5th Cir. 1974). However, in the instant matter, the employer is not depriving the strikers of their seniority, but is merely restricting their ability to use seniority as a means of displacing strike replacements.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF CROSSOVER FLIGHT ATTENDANTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AND

BRIEF OF AMICUS CURIAE CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

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MOTION OF CROSSOVER FLIGHT ATTENDANTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

This Motion is filed by a group of approximately 500 Trans World Airlines ("TWA") flight attendants, collectively referred to as the Crossover Flight Attendants. Respondent Independent Federation of Flight Attendants ("IFFA"), the collective bargaining representative of the TWA flight attendants, called a strike against TWA in

1986. The Crossover Flight Attendants chose not to participate in the strike or returned to work during the strike. The Crossover Flight Attendants respectfully move the Court for leave to file a Brief *Amicus Curiae* supporting the position of Petitioner TWA. The names of the Crossovers on whose behalf this motion and brief are filed are listed in their *amicus curiae* brief filed with the Court in Case No. 86-1650.

The issue here is whether, after the strike ended, the Crossover Flight Attendants were protected against displacement by the flight attendants who refused to work during the strike, just as the permanent economic replacements hired during the strike were protected from displacement. The decision of the United States Court of Appeals for the Eighth Circuit, reported at 819 F.2d 839, would require TWA to displace many experienced Crossover Flight Attendants, even though inexperienced new hires are insulated from displacement.

The Crossover Flight Attendants present a unique viewpoint in this case. For many of them, their continued employment hinges on how the Supreme Court will rule. Under the decision of the Eighth Circuit, full-term strikers would displace many Crossovers, causing them to lose their jobs. The Crossover Flight Attendants represent the singular interests of the individuals with a great personal stake in this Court's decision. TWA, IFFA, and other *amici curiae* can present the issues from a traditional employer-union point of view, but they cannot profess to represent the particularly personal interests of the Crossover Flight Attendants, whose livelihoods are at stake.

TWA has consented to the filing of a Brief *Amicus Curiae* by the Crossover Flight Attendants. This Motion is made necessary by IFFA's refusal to give its consent.

For all of the reasons stated above, the Crossover Flight Attendants respectfully request leave to file the following Brief as *Amicus Curiae*.

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BRIEF OF AMICUS CURIAE CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

I. INTEREST OF AMICUS CURIAE

The interest of the *Amicus Curiae* is stated in the Motion preceding this Brief and is incorporated herein.

II. INTRODUCTION

The Court will doubtless receive briefs not only from TWA and IFFA, but also from numerous other *amici curiae*, and these briefs will in all probability address the issues in terms of employer *vs.* union. Given that fact, one could forget the people whose jobs are at stake here: the Cross-

overs. This case involves not just dollars and cents, but the jobs of people who have suffered unrelenting abuse for lawfully choosing to remove (as they thought) the threat of their replacement by TWA, by returning to work, crossing a picket line established by a union which they believed no longer had their best interest at heart. The ruling of the Eighth Circuit would deny many of the Crossovers the right to earn their livelihoods.

The Crossovers' jobs hang in the balance. TWA and IFFA have stipulated that many of the Crossovers are junior in seniority to full-term strikers. Stipulation No. 27, Petition for Writ of *Certiorari*, at 61a. If the Court affirms the Eighth Circuit's aberrant ruling, the junior Crossovers will be removed from their jobs, irreparably disrupting their lives and families.

III. ARGUMENT

A. The Denial of Protected Status to the Crossover Flight Attendants Deprives Them of the Effective Exercise of Their Statutory Right Not to Engage in Concerted Activity.

For many years the Supreme Court has shown great sensitivity to the right of employees to make free choices in deciding whether to support or oppose union efforts against employers. The ruling of the Eighth Circuit in this case would eviscerate this Court's holdings that free choice is the rule which must govern all employee decisions to engage in union activity. That ruling would eliminate the principal reason for an employee either to refuse to join a strike or to return to work during a strike: the preservation of his job.

Each of the Crossovers made the difficult decision to cross a picket line of co-workers. Writing for the majority in *NLRB v. Granite State Joint Board,* 409 U.S. 213 (1972), Mr. Justice Douglas acknowledged the difficult personal decision faced by every employee who considers abandoning a strike:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the spector of hardship to his family; the pace with which the employer replaces the strikers may make the strike seem less provident.

Id. at 217.[1]

Since its inception, the Railway Labor Act, 45 U.S.C. §151 *et seq.* ("the RLA"), has protected the rights of carriers' employees, such as the Crossovers, to decide whether or not to support labor organizations: "[t]he purposes of the [RLA] [include]: . . . (2) to forbid any limitation upon freedom of association among employees." RLA Section 1, 45 U.S.C. §151a. Under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, this Court has explicitly recognized the statutory right of employees to choose not to engage in concerted activity such as a strike. *Pattern Makers' League of North America v. NLRB,* 473 U.S. 95, 105 S.Ct. 3064, 3068 (1985).

In implementing the free choice granted employees by the federal labor laws, the federal courts have cor-

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1. With respect to the "protected status" of crossovers, why did *Granite State* state that strikers would consider returning to work to protect against their replacement by newly-hired employees, if crossing the picket line did not protect their post-strike employment vis-a-vis unreinstated full-term strikers?

rectly determined that employees must be free from pressures which would act to deny *effective* exercise of that right to choose freely. For example, in *Pattern Makers' League* the Supreme Court found reasonable a National Labor Relations Board decision that the NLRA prohibits any union rule preventing employees from resigning from union membership at any time, including during a strike. As a result, the Court approved the NLRB's decision that a union could not justify fining employees who resigned from the union and returned to work during a strike, by relying on a union rule against resignations at that time. The union's attempt to fine the employees violated the NLRA because it abridged their full and effective exercise of NLRA Section 7 rights. *Id.* 473 U.S. at ....., 105 S.Ct. at 3076. Implicit in the Court's reasoning is the understanding that a union rule against resignation, although not itself preventing employees from crossing a picket line, effectively denies unfettered exercise of the employees' statutory rights by acting as a deterrent to their free choice.

Union fines against an employee returning to work during a strike are also unlawful, if the employee has lawfully resigned from the union. As the Court observed in *NLRB v. Granite State Joint Board,* 409 U.S. 213, ". . . when a member lawfully resigns from the union, its power over him ends." *Id.* at 215. In that case, the union attempted to fine employees who resigned union membership and abandoned a strike. The Court found the imposition of fines on those employees would, to quote an earlier decision concerning the power of unions to impose fines, " 'invade[ ] or frustrate[ ] an overriding policy of the labor laws . . .' " *Id.* at 216, quoting *Scofield v. NLRB,* 394 U.S. 423, 429 (1969). The "overriding

policy of the labor laws" violated by the union in *Granite State* was the right of employee free association guaranteed by NLRA Section 7. *Granite State Joint Board,* 409 U.S. at 218 (Burger, C.J., concurring).

The Eighth Circuit's ruling here would specifically deny the Crossovers the right to exercise *effectively* their power to refuse to participate in the strike against TWA. If a union's refusal to accept a crossover's membership resignation, or its attempt to impose a fine on the crossover, violates the crossover's statutory right to refrain from concerted activity, a union effort to deny the crossover a job is equally coercive, if not more so.

If this Court adopts the Eighth Circuit's reasoning that strikers may displace crossovers on a seniority basis (even though no provision in the TWA-IFFA collective bargaining agreement or the RLA requires reinstatement to vacancies after a strike in order of seniority), striking employees would be put to the Hobson's choice of resigning their jobs and seeking employment as newly-hired permanent replacements, thereby throwing away the benefits accrued from their seniority. Clearly, that is no real choice; it is a coercive denial of the employee's right not to strike.

If employees have the right to refuse to take part in or support a strike, as is clearly the case under both the NLRA and the RLA, they must be free to exercise that right by returning to work, as the Crossovers did here. Strikes are not without risk to strikers and their union. Striking employees risk losing their jobs to replacements if the employer is able to prevail in the strike. However, the Eighth Circuit's decision would increase that risk, by effectively ending the incentive for strikers to return to

work before the union chooses to end the strike. This would place all strikers at the mercy of the union leadership, a result hardly contemplated by the RLA or NLRA.

B. Protecting Crossovers From Displacement at the End of a Strike Properly Accords Them Equivalent Status With Newly-Hired Permanent Economic Replacements.

The Eighth Circuit's decision is an unprecedented and unprincipled attempt to deprive the Crossovers of their jobs, even though there is no substantive difference between the situation of the Crossovers and that of the new hire replacements, whose jobs are protected. The Crossovers and new hires should be accorded equal status.

The Eighth Circuit's unprecedented decision undermines the careful balance between employers and economic strikers maintained by this Court since its decision in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). The courts have long recognized a balance of rights between employers and economic strikers: employees may strike for better wages, hours, and working conditions and their employer remains free to operate its business during a strike. In *Mackay*, the employer offered permanent employment to those who replaced its economic strikers. The Court found that an employer can lawfully "replace . . . striking employees with *others* in an effort to carry on the business" and that the employer need "not . . . discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *Id.* at 345-46 (emphasis added). The Court reasoned that while discharging or otherwise discriminating against economic strikers tips

the balance too far in favor of the employer, offering and providing permanent employment to those who replace economic strikers maintains the balance. The Court drew no distinction between the types of replacements who may replace strikers, *i.e.*, crossovers or new hires.

In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court held that an award of super-seniority to new hires and crossovers unlawfully discriminated against those who took part in the strike. The super-seniority award would have insulated the new hires and crossovers against future layoffs, as against reinstated full-term strikers who had greater pre-strike seniority. *Id.* at 231-33. The Court found that although the employer's interest in maintaining and operating its business outweighed the damage to concerted activities caused by permanently replacing strikers, a different result was necessary when the employer offered the inducement of "super-seniority *in addition to* permanent replacement." *Id.* at 232 (emphasis added).

In purporting to apply *Mackay* and *Erie Resistor*, the Eighth Circuit held in this case that the Crossovers had no protection against displacement by senior full-term strikers, even though the newly-hired replacements were protected. The Eighth Circuit's reading of *Erie Resistor* is clearly contrary to the rulings of this Court and of other Courts of Appeals. Where a court has found an employer guilty of treating full-term economic strikers discriminatorily, the crossovers have received benefits from the employer beyond the mere assurance of a job when the strike ended. In other words, the illegal conduct was that the crossovers were given something vis-a-vis reinstated strikers that they did not have before the strike began.

The decisions of the Courts of Appeals demonstrate that tangible benefits to crossovers, beyond permanency, are necessary before an employer is guilty of interfering with an employee's free and uncoerced choice to return to work or remain on strike. For example, in *NLRB v. Rubatex Corporation*, 601 F.2d 147 (4th Cir. 1979), *cert. denied*, 444 U.S. 928 (1979), the Fourth Circuit held that an employer cannot give bonuses only to crossovers and nonunion employees who worked during a strike, under the rationale that these employees helped the company preserve its reputation. The Fifth Circuit in *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), held that after the termination of a strike, an employer may not permanently assign strikers to less desirable shifts and crossovers and new hires to more desirable shifts, when before the strike the company policy had been to rotate shifts. The Ninth Circuit in *NLRB v. Swedish Hospital Medical Center*, 619 F.2d 33 (9th Cir. 1980), held that the compensatory day off given to crossovers to reward them for added stress during the strike was discriminatory.

However, the Eighth Circuit has determined that offering to employees what they had before, to wit, a job, is an unlawful inducement to quit a strike. This is a curious holding from the same Circuit that paraphrased *Mackay* as deciding that "an employer is entitled to solicit replacements by guaranteeing them a measure of permanence, *even though as a result strikers may be induced to abandon a strike to avoid being replaced.*" *Randall, Division of Textron v. NLRB*, 687 F.2d 1240, 1246 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (emphasis

added).[2] Moreover, the Eighth Circuit in *Randall* cited with approval *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), which held that layoffs of crossovers and permanent replacements after the termination of a strike do not create vacancies to which unreinstated strikers are entitled to return when the employer decides to order a recall. *Randall*, 687 F.2d at 1247.

The Eighth Circuit's decision also unfairly differentiates between new hires and crossovers, the former being permanent replacements under its decision, and the latter simply employees. Under this decision, a striker with twenty years' seniority could displace a crossover with nineteen years' experience, but not a new hire with but one day on the job. According to the Eighth Circuit, permanent status apparently is only for the new employees hired during the strike, not the prestrike employees who returned to work during the strike. In other words, a crossover with less seniority than the strikers, but still more than the new hires, will be forced to "resign" and apply for work as a new hire, if he or she wishes to retain a job when the strike ends.

The Eighth Circuit's distinction between permanent replacements and crossovers runs counter to the decisions of other Circuits. For example, the Second Circuit in *Lodges 743 and 1746, etc. v. United Aircraft Corporation*, 534 F.2d 422 (2nd Cir. 1975), *cert. denied*, 429 U.S. 829 (1976), held that those employees who were absent during an economic strike out of fear of violence did not voluntarily incur a risk of loss of their jobs, and could be

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2. The Eighth Circuit's decision becomes even more incredible when one recalls that the very replacements at issue in *Mackay* were crossovers.

accorded status superior to that of employees who actively took part in the strike. Thus, the employer's reinstatement of the nonstrikers before the reinstatement of the strikers was not unlawful discriminatory treatment. In *NLRB v. Transport Company of Texas*, 438 F.2d 258 (5th Cir. 1971), the Fifth Circuit held that an employer could refuse to reinstate economic strikers if the employee complement was filled by nonstrikers and new employees hired during the strike. When the strike ended and the strikers applied for reinstatement, the employer recalled only enough strikers to fill the number of employees needed. The nonstrikers and new hires were not displaced. In *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), the Sixth Circuit considered an economic strike in which nine employees crossed the picket line and fifteen new employees were hired before the end of the strike. The court stated that two employees who crossed the picket line (but were among the last to do so) were not treated discriminatorily when they were not given full-time jobs, because the employer had a sufficient business justification to refuse to reinstate them in light of the low work demand at that time. *Id.* at 80. In other words, even though these employees were senior to the employees who crossed the picket line first, the employer need not displace those employees for them. Indeed, the court stated that the employer was not compelled to displace any of the employees who worked during the strike to make room for the returning strikers. *Id.*

TWA was not acting discriminatorily when it refused to displace the Crossovers for returning strikers. It was not discrimination against the strikers for TWA to accept the Crossovers' decisions to return to work and to refuse to reinstate strikers solely by seniority. (TWA had told

all strikers they would be reinstated if they returned to work during the strike, if vacancies were available). Indeed, as the Sixth Circuit stated in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), there is no right to recall according to seniority in the absence of such a provision in a collective bargaining agreement or a binding past practice. In the absence of such a right, an employer may establish a new recall procedure so long as it is "applied consistently." *Id.* at 1500, citing *Lone Star Industries, Inc.*, 279 NLRB No. 78 (1986), *enf. denied*, 125 LRRM 3063 (1st Cir. 1987).

In *American Olean*, the employer used a chronological list of employees who offered to return during the strike to fill vacancies that arose after the strike. The court found that the employer did not use the list "with the purpose of discriminating against those most active in the union." 826 F.2d at 1502. In the case at hand, as in *American Olean*, there is no provision in the collective bargaining agreement which requires TWA to reinstate the economic strikers according to seniority when openings become available. These Crossovers were not unlawfully induced by the fact that they believed they would have a job when the strike terminated—they already had jobs before the strike. Indeed, the Crossovers were not even promised the same job that they had before the strike; they only expected to work where they were needed.[3] In

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3. The Eighth Circuit below cites with approval *George Banta Co. Inc., Banta Div. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), which held that the employer committed an unfair labor practice when it assigned each crossover the job classification and wage rate held by the employee before the strike regardless of the company's production requirements on the work actually performed by the employee during the strike. The case below is distinguishable on several grounds, including the fact that TWA only offered "a" job, not the "same" job.

some cases the job they received post-strike was less desirable than the job they had before the strike.

The Eighth Circuit's decision is without support in the law or underlying policy. The Crossovers had a right to be reinstated when they offered to return to work, since there were vacancies which TWA could have filled by hiring new employees. The Crossovers exercised free choice in returning to work, desiring nothing more than what the Eighth Circuit has conceded to the new hires: jobs at the end of the strike. That protection is in accord with the rulings of this Court and the other Circuits, and acknowledges the proper status of employees who choose not to engage in concerted activity.

C. Policy Considerations Counsel in Favor of Recognizing That Crossovers and Permanent Replacements Should Have Equivalent Employment Security.

The Crossovers made one of the most difficult decisions of their lives when they decided to continue performing their jobs for TWA. The Eighth Circuit's decision radically changes the balance of labor relations by depriving the Crossovers of free choice. The Crossovers and newly-hired replacements should be accorded equivalent status as against the full-term strikers.

What can an employee do if he or she does not want to support a strike? The Eighth Circuit would say, "Very little." If the employee refuses to strike or returns to work after the strike begins, he or she will be displaced by senior strikers when the strike ends and will be rehired only in seniority order. Effectively, the nonstriker will only be holding a job for a striker.

The only alternative for the employee who does not want to engage in the strike and who, naturally, wants to continue to work beyond the end of the strike, carries a totally unacceptable and unreasonable price tag. That alternative requires the employee to resign his or her position with the Company and then reapply in the hope of being hired as a new employee and permanent replacement. Thus, the price of not striking is the loss of all seniority and corresponding pay and fringe benefits—the Hobson's choice noted in Section III(B) above.

The policies cited by the court below in favor of its decision do not withstand analysis. That court decided that nonstrikers should not be treated as permanent replacements because such treatment would (a) discriminate among employees on the basis of union activity, (b) induce employees to abandon the strike, and (c) likely create long-term conflict and division in the workforce. To respond to these inadequate reasons in reverse order, the workforce will suffer infinitely greater long-term conflict and division under the Circuit's rule when the strike ends and senior strikers suddenly replace junior nonstrikers and begin working side-by-side with newly-hired permanent replacements. The returning strikers' bitterness and resentment toward the new hires is predictable and the simultaneous return of a large number of strikers will greatly increase the tension.

Second, the Circuit does not merely eliminate an inducement for employees to return to work. Rather, it eliminates the option for employees to refuse to engage in concerted activity, drastically penalizing employees who would dare to exercise their statutory right of refusal.

Finally, there was no discrimination against the full-term strikers on the basis of union activity, but simply a reinstatement of the Crossovers to vacancies which existed when they offered to return to work. The full-term strikers made no such offer to return.

IV. CONCLUSION

The Crossovers urge the Court to reverse the decision of the Eighth Circuit because it deprives the Crossovers of their right to refuse to engage in concerted activity and will force several hundred of the Crossovers out of their jobs. IFFA and its striking members assumed the risk of losing the strike; the Eighth Circuit's decision, if allowed to stand, would remove all risks to a union in deciding to strike and allow the union to impose its will on all employees, even those who do not wish to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File and Brief of *Amicus Curiae*, Crossover Flight Attendants in Support of Petitioner, were mailed by first class mail, postage prepaid, to John R. Hurley, Esq., 204 West Linwood Blvd., Kansas City, Missouri 64111, Counsel of Record for Respondent Independent Federation of Flight Attendants, and Murray Gartner, Esq., 300 Park Avenue, New York, New York 10022, and Paul E. Donnelly, Esq., P.O. Box 19251, Kansas City, Missouri 64105, Counsel for Petitioner Trans World Airlines, this 26th day of May, 1987.